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Advance of 2c in Yellow Pine Lumber Rate Unreasonable.

Supreme Court of United States.

October Term, 1906.

No. 588.

THE ILLINOIS CENTRAL RAILROAD COMPANY, Et Als,

Appellants,

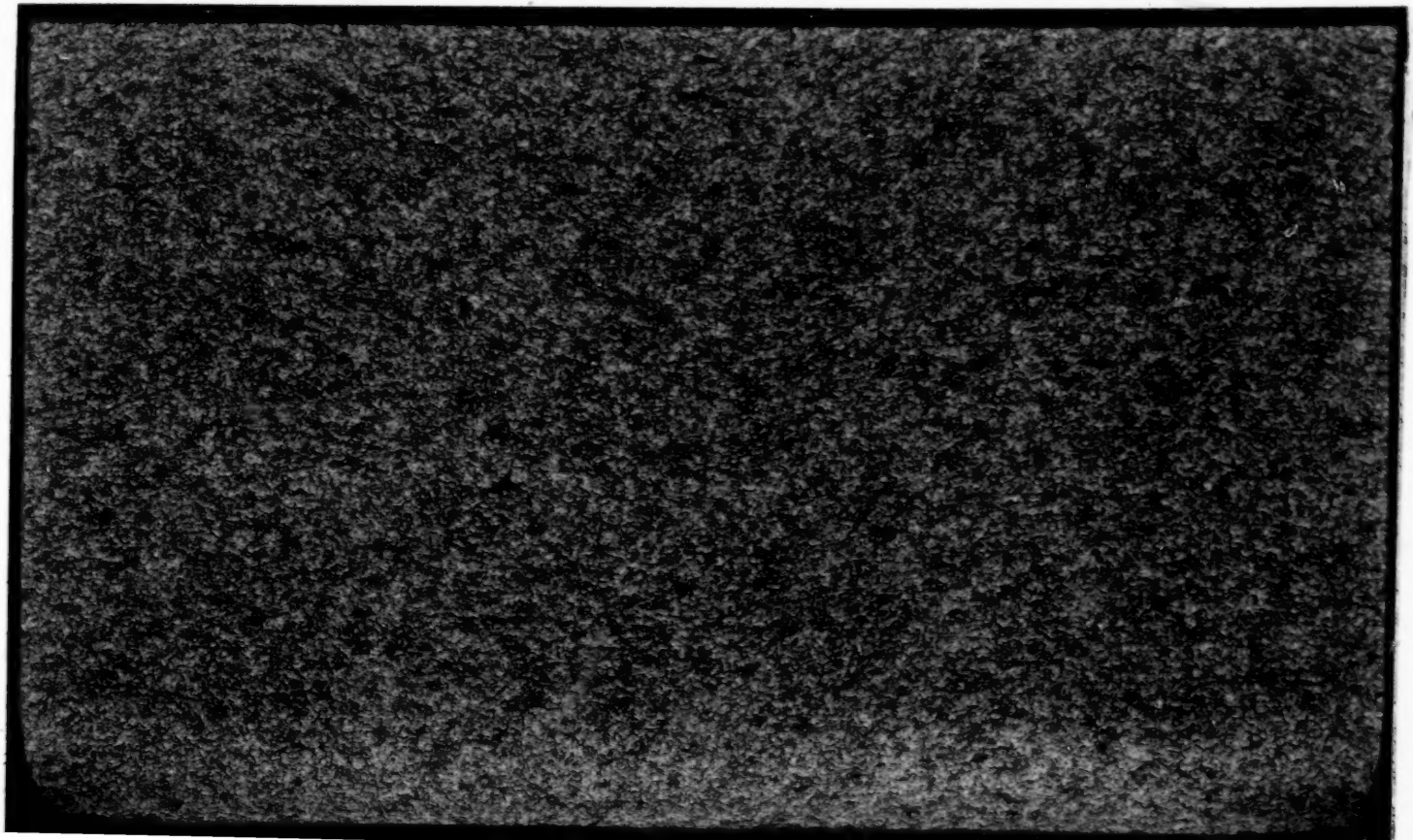
vs.

INTERSTATE COMMERCE COMMISSION.

BRIEF FOR APPELLEE.

MARCELLUS GREEN,
GARNER WYNN GREEN,
OF COUNSEL FOR APPELLEE.

Tucker Printing House, Jackson, Miss.



In the Supreme Court of the United States.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 588.

October Term, 1906.

ILLINOIS CENTRAL RAILROAD COMPANY, Et Als.,

v.

THE INTERSTATE COMMERCE COMMISSION.

BRIEF OF MARCELLUS GREEN AND GARNER WYNN GREEN OF COUNSEL FOR APPELLEE.

This is an appeal by the Illinois Central Railroad Company, and The Gulf & Ship Island Railroad Company, and The Southern Railway Company, and The Mobile & Ohio Railroad Company, and The New Orleans & Northeastern Railroad Company, and The Alabama Great Southern Railroad Company, and The Cincinnati, New Orleans & Texas Pacific Railway Company, and The Alabama & Vicksburg Railway Company, and The Louisville & Nashville Railroad Company, from the decree of the Circuit Court of the United States for the Eastern Division of Louisiana, Parlange, J., presiding, in a suit brought by the Interstate Commerce Commission to enforce its order, made on the petition of the Central Yellow Pine Association, declaring "that the advance, April 15, 1903, of two cents in the Cairo rate (with a corresponding increase in the rates to the other Ohio river crossing)" on yellow pine lumber "was not warranted under all the facts in evidence, and that the resultant increased rate is unreasonable and unjust." (R. V. II, p. 999), and wherein, upon the record and evidence before the Commission, as well as additional evidence taken by both complainant and defendants

in the Circuit Court, the Circuit Court, without a written opinion, confirmed the findings and order of the Commission by its decree, (R. V. I, p. 513), and rendered a final decree enforcing the order of the Commission.

The assignments of error, effect the fifth, involve practically the same questions, and for brevity may be considered together.

The questions involved were controverted questions of fact, and upon which the evidence was conflicting, viz., whether this advance of 2c per hundred pounds in the rate on yellow pine lumber was unreasonable.

The companion case from the Georgia territory of **Tift v. So. Ry. Co., et als.,** 138, Fed. 753, was begun in the Circuit Court of the District of Georgia, before Judge Speer, and was referred to the Interstate Commerce Commission, to report whether the advance of 2c rate was unreasonable, and the Commission found, and in an exhaustive opinion reported that the advance of 2c was unreasonable; and this finding, in the nature of a report of a master, was confirmed by the Circuit Court in an able opinion; and from the final decree in that case an appeal was taken to the Circuit Court of Appeals for the Fifth Circuit, and the Circuit Court of Appeals in a memorandum opinion, held that "this case was correctly ruled and decided in the Circuit Court" and affirmed the decree. **So. Ry. Co. v. Tift,** 148 Fed., 1021.

Hence, this case, involving controverted questions of fact, —the reasonableness of a certain advance of 2c per hundred in a certain rate, upon conflicting evidence—comes here with findings of fact of the Commission, made in two separate independent proceedings, and upon separate hearings, concurred in and approved by the decree of the Circuit Court of the Eastern District of Louisiana, and by the decree of the Circuit Court of the Eastern District of Georgia, and this latter decree affirmed on appeal by the Court of Appeals of the Fifth Circuit.

The able opinion of the Commission in this case, and that of Judge Speer in **Tift v. So. Ry. Co.,** 138 Fed., 753, contain a full and clear refutation of the contentions of the defendants in this suit, and demonstrate upon exhaustive consideration of all of the questions that this advance was unlawful, unreasonable and unjust.

Counsel contended below that the defendants in the Circuit Court stood in the attitude of exceptors to the findings of the Commission; but the rule is broader than that; for the Court is not confined to the grounds,nor to the reasons assigned by the Commission, but may support the conclusions that the rate is unjust and unreasonable by reasons other than those given by the Commission. **Interstate Commerce Commission, v. So. Pac. Ry.,** 132 Fed., 829.

The Circuit Judge in the case at bar confirmed and adopted the findings of the Commission, and the Circuit Court of Appeals affirmed the findings of Judge Speer, which confirmed the findings of the Commission in the Georgia case.

The question of the reasonableness, **vel non,** of a rate is a question of fact. The Commission, a body of rate experts, skilled in the knowledge of conditions, of environment and of transportation relations, (**E. T. Va. & Ga. Ry. v. Com.,** 99 Fed., 52) and peculiarly fitted to determine the question of reasonableness of a rate (**Tift v. So. Ry. Co., supra**) with the witnesses before it, and who, like a jury, saw them and their manner of testifying, **on a conflict of evidence,** has found the facts against the defendants. The statute gives to this finding the effect of being **prima facie** evidence of correctness. In **probative force,** its findings carry greater weight than **prima facie** evidence because of its ability, experience and great learning on these questions.

Where a Master and the Circuit Court, or the District and Circuit Court concur in findings of fact, they will not be disturbed on appeal unless there is no evidence to support them. **Schwartz v. Duss,** 187 U. S. 10; s. c. 103 Fed., 561; **Murphy v. So Ry. Co.,** 115 Fed. (5th Circ.), 257; **Dravo v. Fabel,** 132 U. S., 487

This bill is in the nature of an appeal from the judgment of the Commission, and while the decree in the Tift case was in another proceeding, it was an adjudication upon common questions of law and fact, and, as such, should be tantamount, as evidence, to an adjudication of the like issues here. **1 Pom. Eq. Juris.,** Secs. 245, 253, 255, 256, and note; **Sharon v. Tucker,** 144 U. S., 533; **Va. Chem. Co. v. Ins. Co.,** 113 Fed., 1; **Crawford v. Railroad Co.,** 83 Miss., 717.

Counsel for defendants below admitted in argument the rule of evidence, announced by the Commission, that where there had been a rate in effect for a long time, and then an advance was made, the burden of proof was on the railroads to show that the conditions had so changed as to justify the advance. (**Op. Com. V. II.,** R. 987; **Tift case, supra,**; **1 Greenleaf Ev.,** Sec. 41; **Holmes v. So. Ry. Co.,** 8 I. C. C. R., 568; **McMorran v. Grand Trunk Ry.,** 3 Id., 252.) This burden was upon defendants before the Commission, and it is augmented here, by the statutory presumption, and also by the probative effect of the finding of the Commission itself, and by Judge Speer's opinion and decree, and by that of the Circuit Court of Appeals, and by that of the Circuit Court.

Hence, without further examination of the evidence this decree should be affirmed.

If, however, the merits must be tried anew then we contend as follows:

The complaint before the Commission was filed against all of the above defendants, but upon the disclaimer of the Mobile, Jackson & Kansas City Railroad Company the proceeding was dismissed as to it.

The question in issue is:

Whether this advance of two cents per hundred on yellow pine lumber promulgated by the tariffs of each of defendant railroad companies, and applied exclusively south of the Ohio River, and enjoyed, exclusively, by the Illinois Central Railroad Company, the Mobile & Ohio Railroad Company, the Southern Railway Company, the Alabama & Great Southern Railway Company, the Cincinnati, New Orleans & Texas Pacific Railway Company and the Louisville & Nashville Railroad Company, and by the Gulf & Ship Island Railroad Company upon traffic south of the Ohio and west of the Missouri rivers, violates sectionone of the Act of Congress, entitled: "An Act to regulate commerce," approved February 4, 1887, Sup. Rev. Stats. U. S., 529, providing that:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving,

delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful"; and, also, section 2 of said act prohibiting special rates, rebates, etc., and declaring them unlawful; and section 6 thereof?

Was this advance of the rate an unreasonable and unjust charge for the service rendered in the transportation of this property?

I.

(a) **AS A TRANSPORTATION PROBLEM:**

Wherein consider:

1. Whether more is demanded than this service to the public is reasonably worth?

(b) **AS A FINANCIAL PROBLEM:**

Wherein consider:

1. Whether the advance is necessary in order that each railroad company may earn a fair return upon the value of that which it employs for the public convenience?

(c) **AS A LUMBER TRAFFIC PROBLEM:**

Wherein consider:

1. Whether, if additional revenue is justifiably required, this burden should be placed on yellow pine lumber?

AS A TRANSPORTATION PROBLEM.

The proximate cause of all advances in rates should be that each railroad corporation, as and for itself alone, finds that the rate charged is not a fair return upon the value of that which it employs for the public convenience; and that, therefore, a fair consideration is not paid by the public for the service rendered. This is necessarily a subjective condition. The value of the property, capital stock, etc., each company has invested differs radically; so, too, the cost of operation; and, hence, what might not be a fair rate or basis of return for one company might be for another. The particular condition of each company must be the standard of whether this fair return is being made. Each corporation is a distinct entity, corporate, financial and operative, and without interdependent relations with any other upon

the proposition of the amount of earnings necessary to yield a proper return upon the values employed in the service of the public.

Each corporation has a governmental delegation of the power to levy tolls upon the public for its own services. This delegation gives no power, by convention, to create or to limit the measure of another corporation's power or right to exact tolls or taxes; on the contrary, this is impliedly prohibited. It is the exercise of a governmental function, and it must be exercised, measurably, as the government itself would exercise it were it operating the franchise. The government should adjust its taxation to the benefits to accrue to each succeeding generation. An expensive public building should not be paid for by taxation of the present generation in a single year. As its benefits to the public inure, year after year, the public of tomorrow should bear a part of the expense of creating the benefits it enjoys. So with the cost of construction and betterment of railroads. The magnificent terminals at Chicago will be enjoyed by a future as well as by the present generation, and the cost of this public improvement, though made by a railroad company, should not be paid wholly by tolls exacted from the public of today, but should be projected proportionally over the future. The life of steel rails is 20 years, a part of their cost should be paid each year. Ties last eight years—a proportionate part of their cost should be the annual charge to the public. Cars, locomotives, bridges and all other permanent improvements, additions to the property, and belonging to capital, should be governed by the same rule. **So. Pac. R. R. Co. v. Board,** 78 Fed., 236.

If these betterments were paid for by bonds, each year should pay its interest and raise a proportionate sinking fund —if the funded debt of railroads is to be treated as an exigible debt at maturity. The rule of finance now is, however, to treat these bonded debts of railroads as a permanent investment. If, as is contemplated by the state in granting railroad charters, the stockholders subscribe and pay for all property, betterments and improvements, then the public is expected to pay only such yearly tolls as will pay a fair return upon the investment which is used for the public convenience; and this would embrace the expenses of preservation of the property, its operation and a fair return upon the capital invested.

Chairman Knapp in his **Essay on Railroad Pooling,** p. 129, says:

> "But railroad transportation is not a commodity, it is distinctly a service. The physical appliances by which this service is performed are property, they are acquired; not so the right to their use, that is enjoyed. The ownership of the carrier becomes the privilege of the public. In order that private enterprise may furnish this means of conveyance it must possess special and extraordinary powers granted for the purpose by the state. Through the exercise of these powers the railroad participates in the duties of civil administration and discharges obligations which are innate in the constitution of society. For reasons of expediency the sovereign abdicates its authority in this particular in favor of corporations which it has created, but this circumstance does not change the nature of the service, or the principles which should govern its performance.
>
> "On this foundation, laid in the nature and necessity of social order, rests the common right to just and impartial charges for public transportation. The railroads are an agency of the state for discharging a public duty of the highest utility. They are not vendors or merchants, free to make secret and varying bargains with their customers, but the purveyors of a public privilege which all are entitled to enjoy on the same terms. Neither official station, personal distinction nor patronage of unusual volume, furnishes a defensible ground for giving one man cheaper conveyance than another."

The circumstances attending this two-cent advance of rates were that the railroad companies assumed that the yellow pine industry was enjoying great prosperity, and their answer avers, on information and belief, in the proceedings before the Commission, "that the profits heretofore and now derived from their mills * * * are unusual and excessively large."

The Southern Railway was the first to instigate the advance. (R. V. II. 688) **In re Proposed Advances in Freight Rates,** 9 I. C. C. Rep., 426, in comparing the Southern with other railways as a standard, Judge Prouty said:

"Upon the other hand, it would be equally unfair to the public if the most expensive line were made the standard. The Southern Railway carries grain to some extent to Norfolk, Virginia,. The distance is fully as great and the rate less than to New York. Its operation is expensive, its tonnage comparatively light; its net earnings per mile only about $1,700. A rate to the seaboard which upon any fair basis of compensation to investment would be reasonable for that company would be extravagantly high for the trunk lines. To permit such a rate would be to impose upon the general public the payment of an exorbitant charge."

As a reason for an advance, Mr. Powell of the Southern, wrote Mr. Hudson, of the Illinois Central, January 2, 1903 (R. V. II, 688):

"The rates on lumber and pig iron have generally been adjusted with relation to the price of the commodity. We have advanced the rates on pig iron * * * The rates, however, on lumber are still much lower than they were twelve years ago, while we are told the profits are quite liberal.

"The **present car shortage and lack of motive power has induced shippers to say to us that they would be willing to pay higher rates if an ample supply of cars and quicker service can be maintained.** Only three days ago a party called to see me in Washington, offering to pay an advance over the present rate if we could furnish cars * * *. **We could not supply the cars,** and, in any case, I do not believe we could legally have charged more than the published rates.

"At the present time, the basing rate from the South to Cairo is seven cents less than the basing rate to Cincinnati. I believe this differential can be reduced, and that all lines east of the Mississippi river can afford to advance the basing rate to Cairo two cents per hundred pounds. This will advance a great many of the through rates to Pittsburg territory, which is accessible via the Atlantic Seaboard, and therefore, is subject to indirect water competition.

"Do you see any objection to advancing the basing rate to Cairo two cents per hundred pounds? This will make Cairo seventeen (sixteen) cents and Cincinnati twenty-two cents from points on the South of a line drawn from Vicksburg, Miss., through Jackson and Meridian, Miss., Selma and Montgomery, Alabama, to Savannah, Ga.

"My suggestion would be that the advance in the rate be taken up from the prorating point, inasmuch as the differentials now allowed the initial lines are quite generous

"Yours truly,

"T. C. POWELL,

"Freight and Traffic Manager."

(The Italics are ours.)

Thus, while confessing inability to perform the public service required by its charter as to furnishing equipment, Mr. Powell seeks to advance the rate for the reason that the necessities of the lumbermen, arising from this acknowledged dereliction to the public, can be made to coerce payment of the advance.

Mr. C. W. Robinson (R. V. II, 56-7) states:

"I think that the railroad people were mistaken when they thought they needed any increase in the rates whatever. I think their reports, especially the reports of the older and better managed railroads, show conclusively that they were earning not only a fair compensation on the cost of their properties, but that they were earning an abnormally large percentage on the cost of the properties; that they were earning this abnormally large percentage on the cost of the properties in spite of the fact that they were operating under congested conditions, in that they were unable to handle the traffic that they attempted to handle. It congested at junction points and terminal points until the losses involved in such congestion amounted to not thousands of dollars, but ran into millions of dollars. During the year of 1902, at Meridian, Miss., the Mobile & Ohio were unable for some nine or ten weeks to receive all the business that was offered them. One car of lumber that I have particularly in mind, originating on the line of the Northeastern road, shipped to Carroll to be stopped for dressing,

required seventy-seven days to get to the planing mill, a distance of about 150 miles. This delay was due to the congested condition of the yards of the Mobile & Ohio at Meridian. At Jackson, Miss., the congested condition was so great as to almost surpass belief. Perishable freight, because of this congestion, spoiled and was paid for by the railroad companies. Notably at Memphis, Tenn., was the traffic congested. This is true in a less or greater degree of every terminal point I know of and of every junction point. The railroad managements were short-sighted and did not provide sufficient motive power, a sufficient number of cars, sufficient yard room at junction points, sufficient side-tracks along the lines of their roads, and sufficient terminal facilities at the great distribution centers to earn what they would have earned on the old rate if they could have had these facilities. If they had been able to furnish the cars that the business required at the old rate, their earnings would have been enormously increased on the Gulf & Ship Island. I can say, without hesitation, that not to exceed 50 per cent. of the cars demanded by the business on this line were furnished."

This witness produced letters from the train master of the Gulf & Ship Island Railroad, dated May 9, 1903, nearly a month after this advance went into effect, addressed to witness' firm (R. V. II, 686): "I have your favors of May 4th and May 7th, in regard to furnishing Ralston some cars for shipments to C. C. C. & St. L. R. R. Co.

"At the present time we are not getting more than about 5 per cent of open cars on our orders."

"We are filling orders in their turns, and will try to take care of these shipments soon."

Under date of May 1, 1903, the trainmaster of the Gulf & Ship Island Railroad wrote witness' firm (R. V. II, 58, 686):

"I have yours of the 29th, ult., asking for cars to be placed for the Mason Lumber Co., for Cairo shipment.

"We are getting very few I. C. cars, not over 10 per cent on our orders, and it is impossible to promise that all orders will be filled. However, the best will be done. The I. C. promised that they will give us more cars; if they do, no

doubt we will be able to help you out. I can assure you, however, that you will get your proportion of the cars.

"I have on my desk this morning several letters from planters and mill men that they have had to wait longer than the parties who ship to you for cars."

Witness then read a letter from the Superintendent of the New Orleans & Northeastern Railroad, dated October 19, 1903, (R. V. II, 58, 687):

"In response to your letter of October 17th, stating that it is imperative that two box cars be furnished at Watson spur, and four box cars at Clifton at the earliest possible moment for kiln-dried, high grade lumber, it is useless for me to say that we will furnish these cars at an early date, but we will do our very best in that direction. I suggest that you use coal cars or dumps to carry this lumber to Meridian, and we will make an effort to furnish them, putting on top of the dressed lumber a roof or shed of common boards. This method is practiced by other mills on line who are anxious to get lumber of this character to the planing mills at Meridian. If you adopt this suggestion we will endeavor to move the lumber with very little delay."

Mr. Robinson (R. V. II, 59) read from the Ninth Annual Report (1903), page 4, of the Southern Railway as follows:

"While the increase in gross earnings is large, it would have been exceeded if equipment, yards and shops had been equal to the demand upon them, and the net results could have been much improved if the transportation had been done under normal instead of under congested conditions. It is confidently believed that with the improvements now in progress much better operations will be obtained."

The congested conditions were so clearly demonstrated by the evidence that Commissioners Prouty and Yoemans stopped the examination of Mr. I. C. Enochs on this proposition (R. V. II, 167).

Touching the conditions subsequent to the taking of the testimony before the Commission in 1903, and up to February, 1904, Mr. Compton, Traffic Manager of the Louisville & Nashville Railroad (Dfts. New Evidence, V. I, 167), testifies:

* * * "The car supply of the Louisville & Nashville

Railroad has been taxed to its utmost. This is true with respect to lumber shipments, as well as commodities in general, although we are now furnishing the lumber shippers on our lines more cars than we were called upon to furnish in previous years, yet the supply is inadequate, and no transportation man could possibly have anticipated and been ready for the emergency which has occurred. By reason of shortage of cars, the Louisville & Nashville Railroad has considered that its first duty was to the mill men upon its own line and it has discontinued the sending of cars off its line for loading at mills on foreign roads. The car shortage has been practically continuous since the presidential election, and still continues, notwithstanding we have substantially increased our rolling stock."

Mr. L. Green, General Freight Agent of the Southern, (Dfts. New Evidence, V. 1, 259) testifies:

"I suppose the Southern occupies a peculiar position with respect to the handling of its business. The Company was organized on the 1st day of January, 1894, and it came into the possession of a lot of properties that were poorly equipped, that were run down in every respect, and almost beginning with its organization the expansion of business began, so that our difficulties were very much greater in taking care of the increased business than were those of the old lines that had been under good management for many years and had been kept up and improved and prepared to meet the increased business."

Mr. Stuyvesant Fish, President of the Illinois Central, (R. V. II, 462), testifies:

"Q. Is it not a fact that the Illinois Central had more traffic to haul during the years 1902-03 than its motive power would transport?

"A. Yes, sir; it has been in that condition for a good many years. It has been constantly, as you can see from the reports of the Illinois Central for 1903, table number 8, increasing its service to the public and very rapidly. * * * We are rendering all of the service we can with the limited means we have, and we are furnishing cars and engines as fast as we can get the money for them. Our new engines are not giving satisfaction. The new engines

will not be a failure ultimately but at present they are a failure. They do not carry heavy tonnage, for which they are designed, economically, and any man in the service of the Northwestern Companies will testify to the same."

Q. to Mr. Fish, R. V. II, 463:

"I understand you to say that for the last few years the Illinois Central Railroad has had more traffic offered than its facilities could transport?

"A. I think that is pretty nearly the truth, and we have struggled with that to do our duty the best we could."

To show that the rate, in effect January, 1903, was remunerative, and that competition played no part in making the advance, on **January 16, 1903,** The Alabama & Vicksburg Railway and the New Orleans & Northeastern Railroad, two of these defendants for themselves, in connection with other of defendants, made a rate, to Detroit, Mich., in Central Association territory, on yellow pine lumber, of twenty-six cents per hundred; and notice was given by the Southeastern Mississippi Valley Association accordingly (R. V. II, 689, 690). The rate in effect from the Southern Pine District to Detroit, Mich., prior to this advance of April 15, 1903, under the agreement of January 30, 1903, was twenty-eight cents per hundred, and by this advance it was made thirty cents per hundred (R. V. II, 846-7; Ex. A, to Bowes' evidence.)

Thus, these two railroads of and for themselves, on January 16, 1903, in connection with others of defendants, were willing to accept a rate of twenty-six cents, or two cents less than the then prevailing rate, and four cents less than that of April 15, 1903.

The Northeastern Railroad had just made the rate, **supra,** on yellow pine lumber to Detroit of twenty-six cents, and when its representatives came to vote, in the meeting of January 30, 1903, he **withheld his views;** but later, on February 2 (R. V. II, 691-2) wired "our line will agree to two cents," etc.

Thus, with confessed inability to handle, efficiently, for want of equipment and managerial capacity, the enormous volume of traffic offered for transportation, and whereby extraordinary and continuous losses were being sustained by these railroads, they seek to increase the rates on yellow pine lumber; and because of that railroad heresy that the traffic will bear the rate.

The movement to make this advance took the form of meeting by the representatives of the interested roads in the Mississippi territory at St. Augustine, and then at New Orleans, to obtain an agreement to make the advance. At this meeting it developed that the advance could not be made unless the trans-Mississippi roads would agree to advance the rate also, and so the meeting at New Orleans adjourned to meet at St. Louis, January 30, 1903, for the express purpose of obtaining an agreement with the trans-Mississippi roads. At St. Louis the Southeastern Mississippi Valley Association met pursuant to the adjournment from New Orleans, and appointed a committee to confer with the Trans-Mississippi Association then in session there, and the conference was had, resulting in an agreement by those roads to advance, **contingent upon** the advance by the Cis-Mississippi roads. (R. V. II, 695, 6, 9, 700, 704, 705, 716, 725). The Southeastern Mississippi Valley Association then agreed to to it, and then took the matter up with the Southeastern Freight Association, and it agreed to the advance, **contingent upon** a like advance from Arkansas and Louisiana, and the general letter No. 1499 of Chairman Washburn, dated Feb. 7th, 1903 (R. Vol. II, 704), "To Members," after reciting these matters summarizes thus:

> "You will no doubt understand from the foregoing that it was the intention of lines individually to advance the rates two cents per one hundred pounds, where it might be deemed practicable to bring about such advance. This, based on the fact that when lumber rates were last advanced by Texas lines, the parity as between rates from southeastern territory and Texas territory was not strictly observed. In other words, higher rates were carried from Texas-producing points than were carried from the southeast under former adjustment, in other words," (despairing of concealing the fact under vague generalities longer) "the Texas lines understand **the agreement** to be that they can carry the same rates if they deem it advisable to do so. The opinion, however, was pretty generally expressed that it was their desire to get the full advance of two cents from Texas-producing points to the territory named in the foregoing recommendation, but if this could not be done, the members want it distinctly understood that they do not

> feel they would be **violating any understanding** if they should carry the same rates from Texas as apply from the southeast based on the two-cent advance contemplated;" etc. (Italics ours.) (R. V. II, 688-810.)

It is unnecessary to detail the evidence as to this agreement to advance. The same character of transaction was thus described **In re Proposed Advance in Freight Rates, supra,** 394:

> "What occurred when these advances were determined upon is instructive. Traffic representatives from the principal lines interested met in the City of New York. The recollection of those present as to what was said upon that occasion was some what indistinct," (compareChairman Washburn's elusive memory of what happened, R., V. II, pp. 116-122), "especially at the last hearing, but all admitted that as a result of the meeting it was determined to make the advances. Some witnesses stated that there was an understanding that they should be made, while the representative of one Southern line testified that he neither agreed nor understood, but simply announced that his line would make the advance. The thing done, not the name, is of consequence. To the public, who pay these rates, it is immaterial whether they have increased as the result of 'agreement,' or 'understanding' or 'announcement.' If this be more than a play upon words, it goes to a criminal quality of the act, not to its practical effect."

This advance then, was an **agreed one,** irrespective of whether the revenue conditions of the participating railroad companies were similar or dissimilar, and in face of the fact that the real trouble was lack of motive power and cars and efficient management to handle the traffic more profitably, and covering the whole southern country from Texas to the Atlantic and south of the Ohio river.

The fact that each of the several Freight Associations agreed to make the advance, "contingent upon," the other Associations making it, evidences clearly that the advance was not being made because the consideration then received was inadequate remuneration for the service performed for the public; for, if the contingency did not happen—if the Arkansas or Georgia roads would not agree—then each road was willing to continue

to perform the service at the then existing rate. Thus, the foundation of this advance is this agreement.

As it was fixed by conventional agreement of carriers, irrespective of difference of conditions, at a certain sum, to be effective or not, contingent upon all interested agreeing thereto, is it not clear that the advance exists by reason of the agreement alone, and that in the absence of the agreement there would be no advance? True, all of the roads published this rate, and must conform to it; but the publication, while apparently the individual act of each corporation, is, in fact, the promulgation of the agreement. It is a fraud upon the Interstate Commerce Act, being the offspring of agreement among the several roads, and not the separate corporate act of each corporation of and for itself, arising from competitive conditions.

The principle of the Interstate Commerce Act is that the public shall have the benefit of the advantage of the competitive action of each carrier separately in its separate, individual capacity, and responsive to the requirements of the individual needs, and according to the individual status of each corporation. Its object was to secure the public against unjust exactions by carriers by suppression of competition. Untrammelled competition was its purpose. If rates are to be made by agreement they will be based on the requirements of the poorest—most inefficient party to the compact—and, therefore, excessive as to all others. To give to the Federal Government more effective control, this act crystalized into a federal statute, the principles of the common law duty of the carrier that goods should be transported at reasonable rates; and to further bring within the jurisdiction of the federal judiciary these principles, the Sherman Act embodied into a federal statute the common law offense of conspiracy to prevent the evasion of the performance of the duty of the carrier to the public by any agreement unreasonably stifling competition.

This federal jurisdiction was further enlarged by the Act of 1903, Acts 1902-03, p. 847, whereby original jurisdiction was given courts of equity, at the suit of the Commission, without prior judicial action on its part, to try any case of discrimination forbidden by law.

Thus, the statutes of the United States forbid unlawful agreements as to railroad rates. An agreement, declared to be

unlawful by the federal statutes, cannot be the reasonable exercise of the governmental function under the charter power to fix rates for a service to the public.

While the Commission is not clothed with power to enforce the Sherman Act, still it must consider all of the facts and circumstances to determine whether the charge for such service is "unjust and unreasonable," **vel non;** and if the rate is based upon an arbitrary, unlawful agreement it could not be predicated of the proper legal elements of a reasonable rate.

The Commission both in this (Op., V II R., 992, 3, 4) and in the Tift case, **supra**, found that this advance of two cents was made by an unlawful agreement, violative of the Sherman Act; and this finding has been approved by the Circuit Court in this case, and by the Circuit Court, and the Court of Appeals in the case of **Tift v. So. Ry. Co.,** 138 Fed., 753; s. c. 148 Fed., 1021, **supra.**

The **object** of the railroads, viz., fixing a rate, if by each for itself, would be lawful; but the **means**—agreement—used to accomplish that object was unlawful; and was an unlawful agreement, or conspiracy in restraint of interstate trade. **1 Bishop New Cr.,** L., Secs. 171, 2, 3; **People v. Mather,** 4 Wend., 229; **Com. v. Eastman** (Mass.), 48 Am. Dec., 596; **Rex v. Fowler,** 1 East P. C., 461.

Such agreements between railroads—public service corporations—are within the Sherman Act. **So. Ry. Co. v. Tift,** 138 Fed., 753; **Joint Traffic Assn.,** 171 U. S., 595; **U. S. v. Trans-Missouri Assn.,** 166 U. S., 290; **Northern Securities Case,** 193 U. S. 197.

These Arkansas lines and the Mobile & Ohio Railroad Company, with their then tap line divisions to the logging roads of from one to six cents per hundred pounds, were parties to this agreement to advance this rate two cents; (R. V. II, 967), and the Illinois Central and the other railroads, with full knowledge of these tap line divisions by these railroads, became parties to their agreement to increase this rate, and thereby sanction and effect was given to these tap line divisions of the rate by all of the parties thereto.

These tap line divisions of the published tariff rates are declared by the (R. V. II, 968,) to be a rebate, and this finding is confirmed by the Circuit Court. Notwithstanding this decision by the Commission on February 7, 1905, the Illinois Central Railroad Company on January 10, 1906, by its letter to I. C. Enochs, General Manager Brookhaven & Pearl River Railroad Company, **voluntarily offered** to give that railroad and other railroads a tap line division of two cents, saying:

> "We have decided **to make some change in the policy** which has heretofore been observed by our Company, and effective February 1, 1906, we propose to allow the Brookhaven & Pearl River Railroad a division of two cents per hundred pounds on yellow pine lumber, car loads, delivered us at Brookhaven, when destined to Ohio river crossings and points beyond, on and east of the Mississippi river and on and west of the Buffalo-Pittsburg line. * * * The lumber should **be billed out of Brookhaven at the regular traffic rates applying from that place** and the division of two cents per hundred pounds to be paid you by monthly claims. **If this arrangement is satisfactory, please advise me promptly,** upon receipt of this letter and I will promptly issue tariff and division sheet. In the event you accept this arrangement, **and which is the same as we will establish February 1st with other roads of similar character and length** as the Brookhaven & Pearl River Railroad, please send me promptly after the close of each month a statement in duplicate, etc. * * * **This same arrangement as outlined above will of course, apply on lumber cut at mills on the Brookhaven & Pearl River Railroad as on lumber manufactured at Brookhaven.** (Italics are ours.) (Complts. New Evidence, R. V. 1, 415.) (Bowes Defts. New Ev., V. I, 146.)

This would have the effect of voluntarily fixing the rate to Cairo at 14c, and of giving the two cent advance, voluntarily, as a tap line division to these little railroads, because of "**some change in the policy.**"

This change of policy was caused by the invasion of the territory by the **competitive** Goodyear Railroad in process of construction. (Bowes, V. I, 146.)

If the Trans-Mississippi railroads and the Mobile & Ohio Railroad, which haul yellow pine lumber into this Central Traffic

territory could afford to render that service for the published tariff up to 1894 of thirteen cents, and up to 1899 of fourteen cents to Cairo, and allow therefrom, by their voluntary act, from one cent to six cents per hundred pounds rebate as a tap line division, (R. V. II, 967), it is clear that the reasonable worth of the service rendered the public by the railroad company would be the thirteen cents or fourteen cents less the one cent to six cents rebate.

The Gulf & Ship Island Railroad and the New Orleans & Northeastern Railroad, **voluntarily**, offered two cents per hundred pounds tap line division, commencing November 15, 1900, (R. V. II, 19). The Illinois Central Railroad Company as shown, **supra,** in 1906, voluntarily offered to reduce its rate by two cents per hundred pounds, and to give this to logging roads along its line; and even to the Brookhaven & Pearl River Railroad Company **upon lumber manufactured at Brookhaven,** a station on the Illinois Central.

The Illinois Central by its voluntary act, **in 1899,** made a contract with the Gulf & Ship Island Railroad Company whereby it agreed to give the Gulf & Ship Island an arbitrary of seven cents per hundred pounds on yellow pine lumber shipped to the central traffic territory for a period of ten years (R. V. II, 964, 5). The lumber to be delivered at Jackson, Miss., by the Gulf & Ship Island to the Illinois Central. Prior to the making of this contract by the Illinois Central, the Gulf & Ship Island, at its connections with the New Orleans & Northeastern at Laurel, and Hattiesburg, and with the Louisville & Nashville at Gulfport, received from three cents to four cents as its division of the through rate on lumber. (Hale, Dfts. New Evidence, R. V. I, p. 215).

Mr. Haiden Miller of the Mobile & Ohio testified (Dfts. New Ev., V. I, 158), that the largest tap line division his road had ever allowed was three and one-half cents per hundred pounds; and that he had no knowledge of as much as seven cents ever having been allowed an originating line.

At the time this contract was made between the Gulf & Ship Island and the Illinois Central the rate to Cairo was fourteen cents. Under this contract for an average haul of eighty miles (R. V. II, 965) the Gulf & Ship Island receives seven cents per

hundred pounds, and the Illinois Central, from Jackson, Miss., to Cairo, 366 miles (two cents bridge) receives five cents per hundred pounds, or 3.8 mills per ton per mile.

This status of the Illinois Central being fixed by contract for ten years, irrespective of changing conditions of traffic, expense, or earnings, it cannot now be heard to complain as to the public that its proportion of this through rate, five cents—3.8 mills per ton per mile—is inadequate compensation.

The Mobile & Ohio receives from lumber originating on its own line 6.5 mills per ton per mile, but on lumber from other roads, **by reason of its agreed divisions** of the rate, it receives 3.8 mills per ton per mile (R. V. II, 384).

Mr. Bowes testifies (Dfts. New Evidence, R. V. I, 144) that this Gulf & Ship Island contract was subject to cancellation on sixty days' notice; and yet, notwithstanding this right to cancel it on the part of the Illinois Central, it voluntarily continues it, and thereby voluntarily accepts the rate of 3.8 mills per ton per mile for its services for 50 per cent of the yellow pine lumber handled by it. (R. V. II, 481).

This would demonstrate that in 1899 a fair rate or return for the service rendered by the Illinois Central for the service rendered in transporting this lumber from Jackson to Cairo, 366 miles, was five cents, and that by its voluntary continuance of this rate upon 50 per cent (R. V. II, 481) of its shipments of yellow pine lumber it could not be heard to demand an increase or advance of rate from the public while it voluntarily executed this contract.

By the voluntary offer of the Illinois Central to give two cents tap line division in 1906, it would appear that for the service it renders to the public, a fair return would be the present rate of sixteen cents complained of less this two cents, or fourteen cents, which was the rate in force prior to April 15, 1903.

The status of the Gulf & Ship Island Railroad Company, thus arising out of this contract with the Illinois Central, whereby it is paid seven cents per hundred pounds, gave it power to dictate its divisions with its other connections, and it exacts five cents per hundred pounds from the New Orleans & Northeastern for a nominal switching service at Laurel, Miss., and

formerly received this five cents whether it switched the cars or not. (R. V. II, 23.)

When the Gulf & Ship Island became a party to these through tariffs it subjected itself to the jurisdiction of the Commission in the matter of these rates. **Penn. Miller's State Assn. v. Phil. & R. R. Co.,** 8 I. C. C. R., 331; **Interstate v. Detroit, etc., R. R. Co.,** 167 U. S., 642. The divisions of the through rate—the amounts received by each carrier—are material elements in determining the reasonableness of the through rate, and of its proper relations to through rates.

The divisions of the through rate are made by **agreement** between the connecting roads.

The rate for the service rendered the public may be ample, and yet, by improvident agreements, whereby excessive divisions are allowed, the intermediate road may receive a smaller compensation for the service rendered the public. If so, the remedy is not to increase the rate but to properly adjust the divisions of the rate. The real ground upon which this advance was predicated, as shown by Mr. Powell's letter, **supra**, and by the allottment of the whole of the advance to the **intermediate** roads, was that the divisions of the rate of the intermediate roads was too low. The defendants, other than the originating roads, complain of the small amount of revenue or low rate per ton per mile realized by them out of their proportions of the through rates. This is due to the large allowances out of the rates made to the originating roads. (See Finding 3 and 4, R. V. II, 964, 5.) With these allowances deducted, the former lower rates were then considered reasonably remunerative for the remainder of the haul to the Ohio river crossings. As the two cents advance goes entirely to the roads continuing the transportation on to the Ohio and none of it to the originating roads, the inference is that advance was made solely with a view of increasing the proportions of the former roads. If the allowances to the originating roads are unreasonably large, as they appear to be from a distance standpoint, and result in unreasonably low proportions to the other roads, this can not be remedied by an advance in the total through rates charged the public. It is the total rate, and not its proportions, which is in issue.

Col. F. & I. Co. v. Pa. Ry. Co., 6 I. C. C. R., 488; **Warren Ehret Co. v. Gen. R. R. Co.,** 8 Id., 598; **Wholesale Lbr. Dealers v. Norfolk & W. R. R. Co.,** 9 Id. 87.

In **Mayor, etc., of Wichita v. Atch. T. & S. F. Ry. Co.,** 9 I. C. C. R., 552, speaking of a status arising from competitive bidding for traffic, it was said:

> "In remarking above that an abnormally low rate temporarily induced by unusual competition ought not to be made the test of reasonableness, it was not meant that the presence of competition deprived a rate of its value as such standard. Upon the contrary it is evident that a non-competitive rate can have no such value. The idea of our legislation in the past has been to secure competition in the expectation that from this would result a reasonable transportation charge. One test of a reasonable rate is to inquire what has been the result of competition between different carriers; when several different lines of railway could and did bid for the same traffic, at what price have these carriers transported that traffic where such competitive conditions, operating through several years, have settled down into a certain rate we think that fact is of great weight. Now, in the case before us competition after being subjected to all the restrictions when possible, resulted in an actual rate from Wichita not exceeding twenty-eight and one-half cents on the average. While not conclusive, this is certainly important in attempting to determine what is a reasonable charge."

As stated, the M. & O. R. R. Company, fixed **by contract** with its tap lines, from which arises nearly all of the lumber originating on its line, a division of from two to three cents (R. V. II, 967; M. & O. Answer to Ints.), and thus, irrespective of the increase or decrease of revenue it has fixed voluntarily that the consideration it receives for its service is worth that much less than it purports on the face of the published tariff to be.

These agreements of themselves prove conclusively that the advance of two cents in this rate was unreasonable and unjust.

These tap line divisions bring the case within the principles of **Interstate Com. v. Railroad,** 186 U. S., 336, and **Covington Stock Yards v. Keith,** 139 U. S., 128, wherein it was held: that the through joint rate from point to point includes adequate compensation for the services rendered at the point of delivery, and that the addition of a terminal charge, without any reduction of the through rate, would be unreasonable.

This thirteen-cent rate having been voluntarily established by (R. V. II, 966 ,7) the Arkansas or trans-Mississippi lines as a reasonable rate prior to 1894, and having been adhered to by them, in the face of the urgency of the cis-Mississippi lines to advance them, must be considered a fair return for the service rendered. The probative effect of this might be different if the thirteen-cent rate had been established by the Arkansas lines by the force of competition. On the contrary, the thirteen-cent rate was established and maintained by the Arkansas lines while a higher rate prevailed with the Cis-Mississippi lines, and in defiance of the efforts of the Cis-Mississippi roads to make them change. If the rate was competitive, "while not conclusive, this is certainly important in attempting to determine what is a reasonable charge.'

In 1892 and prior thereto, as shown by the tariffs, exhibit 20 (Appendices A, B, C, hereto, infra; R. V. II, 639, 40, and Secretary Moseley's certificate, R. V. I, 486, 491), to Mr. Enochs' evidence, and the address of Mr. Gardiner in 1893 (R. V. II, 9-13), Cairo was not a basing point for lumber. The rates were through rates to the several points north of the Ohio river, and the local rate to Cairo in 1892 was 15c. The development of the basing points or gateways of Cairo, Evansville, Louisville and Cincinnati, arose out of the adjustment of the rates in 1894, when the relative status of the trans-Mississippi lines and of the Cis-Mississippi lines were adjusted in the territory north of the Ohio river.

The blanket rate system and these basing points or gateways **were then adopted by the railroads themselves** in fixing the basis upon which the Arkansas or trans-Mississippi lines and cis-Mississippi lines were to come into the Central Traffic territory north of the Ohio river. The Arkansas lines had previously

fixed and maintained against competition and persuasion the thirteen-cent rate to Cairo. Cairo was geographically the nearest common point on the Ohio river to the Arkansas and Mississippi mills. Being the nearest common point, or focus, **it was fixed by the interested carriers** as the basic line and as the basis of the rate. The gateways or bases further east, viz., Evansville, Louisville and Cincinnati, were established relatively to Cairo; and as they were further removed relatively from the basic lines, the rates through those gateways were made relatively higher. The rates were made to the basic points, or gateways, and beyond, by the addition of the local rate beyond the gateway to this rate to the gateway. To equalize the rates beyond, they were made on the lowest combination, so that all of the gateways would, as to rates, be on a parity as far as practicable to points beyond the Ohio river.

Thus this blanket rate, combined with these basing points or gateways, was devised by the railroad companies east and west of the Mississippi river to let all of the roads into this territory north of the Ohio river, and to enable all of them to participate in this business. The scheme did not permit all of the railroads to carry at the same rate per ton per mile. The railroad lines on or nearest to the basic line to Cairo were the most favored, those more remote less favored. Thus, the per ton per mile of the Cotton Pelt and Illinois Central main line and the New Orleans & Northeastern and connections to Cairo would realize about the maximum per ton per mile, their distances being the shortest (R. V. II, 965.)

The less favored roads, i. e., those further removed from the Cairo basic line would have to haul a longer distance, upon the lowest combination rate, and thus their per ton per mile would be less upon lumber basing on Cairo. It is clear, therefore, that this blanket, basing point method is of all methods of rate-making the least measurable in fixation by the standard of the per ton per mile. Its very essence is to let all the roads into this territory with this lumber business, and if some of them, by reason of location, have long hauls, and a low rate per ton per mile, it is because, under this scheme, devised by the railroads themselves, it is not in the favored class near to the basic line.

For this reason the rate per ton per mile given by Mr. Bowes for the Illinois Central as not exceeding an **average** of 4.5 mills per ton per mile on **all of the lumber** handled by the Illinois Central is misleading. The rate is made on Cairo, which is the shortest line for lumber originating on the line of the Illinois Central, or the Gulf & Ship Island via Illinois Central, to Central Traffic territory; hence, the per ton per mile of **all** this lumber should be based on Cairo at 6.3 mills (R. V. II, 966) per hundred, under the fourteen-cent rate, and 7.2 mills under the sixteen-cent rate. When the **average** embraces Evansville, Louisville and Cincinnati, longer distances, it improperly reduces the per ton per mile. This refutes the contention of Judge Baxter in the court below that by taking the **average** per ton per mile, on yellow pine lumber, **through all of the gateways,** the per ton per mile, 5.59 mills to each railroad, as a reasonable charge for the service rendered, was to be fixed. This 4.5 mills average of Mr. Bowes also embraces the yellow pine lumber from the Gulf & Ship Island, about half of the (R. V. II, 481) Illinois Central haul, and thus the average of Illinois Central is reduced by the voluntary contractual elements of the Gulf & Ship Island contract, and whereunder the Gulf & Ship Island receives 17.5 mills per ton per mile (R. V. II, 965.)

The difficulty of comparison of rates by the per ton per mile on lumber as a basis for a reasonable rate is thus apparent. If the short haul is taken the rate per ton per mile is larger than if the longer haul is taken, and so in the absence of an accurate knowledge of the scheme, and of the actual performance of the roads of which the per ton per mile is taken, the mere isolated fact of the rate per ton per mile might be misleading. The Illinois Central would not be allowed, in fixing a reasonable rate per mile to take Cincinnati, with 757 miles (R. V. II, 965) as against Cairo with 444 or 432 miles; the former would yield 6 mills, the latter 7.4 and 7.2 mills, respectively. The shortest available line is the rate basis. (Op. of Commission, R. V. II, 966.)

To illustrate: To show a low rate per ton per mile Mr. Compton of the Louisville & Nashville Railroad by his Exhibits J and K (R. V. II, 872, 873) has taken Cairo as one of the points

for his road on the Ohio river. The L. & N. rails do not reach Cairo; but nevertheless, for **comparative statistics** he takes the **most remote point,** and hence, these exhibits mislead. Again, Mr. Compton takes as his four points from this territory, Lookout, Dolive, Eleanor, and Monistee. Lookout is an extreme station in the Louisiana swamp, from which no lumber arises; Eleanor is an extreme point on the Florida Division; Dolive and Monistee are not to be found on the L. & N. maps, though Mr. Enochs knew where Dolive was, and it is on the extreme south. (R. V. II, 545, 6, 8). Yet these remote points are taken, for thereby the distance is increased, and the rate per ton per mile is lowered, and thereby the exhibits mislead.

This language of the Commission in this connection is particularly appropriate. In **Nat. Whol. D. Assn. v. N. & W. Ry. Co.,** 9 I. C. C. R., p. 114, it is said:

> "A comparison of the rate per ton per mile of one road with that of another is of little value unless based upon the actual tonnage carried of a particular kind of freight. If the rates of two different roads are the same on each class of articles, but one transports a larger proportion than the other of high class traffic, the other road will obviously have the higher average rate per ton per mile. It appears that the principal articles of freight transported by the N. & W. are coal, coke and minerals. For rate making purposes these are generally regarded as low class articles, and where they constitute the principal business of a carrier the average ton-mile rate will of course be comparatively low."

In **Atlantic Coast Line R. Co. v. State,** All Op. U. S. Sup. Ct., Oct. term, 1906, p. 108, 9, it is said: "We are aware of the difficulty which attends proof of the cost of transporting a single article, and, in order to determine the reasonableness of a rate prescribed, it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile. We shall not attempt to indicate to what extent or what cases the inquiry must be special and limited."

By this standard with lumber (low class traffic) at 6.3, or at 7.2 per mills ton per mile, (V. II. 965) and the average of all freight of the Illinois Central being 5.91 mills, either would be unreasonable.

Neither the exhibits of the railroad companies, nor their evidence show what **proportion** of this traffic moves under the high and what under the low rate per ton per mile. The 4.5 mills average of Mr. Bowes is worthless as a standard, unless it is shown **what proportion** of the lumber tonnage moves to Evansville and to Louisville and to Cincinnati over Illinois Central rails. And not only what proportion so moves, but also, as against the public, that it was necessary that it should have moved over the longer haul. The reasons given by Mr. Bowes for carrying part of the lumber by the Illinois Central to these remote gateways, instead of to Cairo by the shorter line, are evasive and unsatisfactory; it was manifestly because thereby the Illinois Central got a longer haul, and preferred to do so (R. V. II, 564). Besides this, 4.5 mills of Mr. Bowes is conjecture (R. V. II, 563).

Mr. Bowes' Exhibit "A" (R. V. II, 846) so much relied on by adverse counsel below shows that the per ton per mile on yellow pine lumber from Texas (Long Leaf pine District) is much below this average of 5.59 mills per ton per mile. It shows as follows:

TO	RATE.	CHARGES PER TON PER MILE.
Cairo	16 c	4.4 mills.
Chicago	26 c	4.9
Peoria	25 c	5
East St. Louis	19.5c	5.1
Madison, Ill	19.5c	5.1
Indianapolis	26 c	5.2
Michigan City, Ind.	28 c	5.1
Columbus, Ohio	29 c	4.8
Cincinnati	27 c	4.9

These are the rates per ton per mile fixed under this agreed advance of two cents and upon the sixteen cent rate. They were fixed by the Texas roads under the circumstances recited in the letter of Mr. Cale, Chairman of the Southwestern Association Tariff Committee (R. V. II, 699-700), to Mr. Washburn, Chairman of the Southeastern Mississippi Valley Association, when this agreed advance was under negotiation, dated February 5, 1903, wherein he says:

> "You will no doubt understand from the foregoing that it was the intention of lines individually to advance the rates two cents per hundred pounds where it might be

deemed practicable to bring about such advance. This based on the fact that when lumber rates were last advanced by Texas lines the parity as between rates from southeastern territory and Texas territory was not strictly observed. In other words, higher rates were carried from Texas-producing points than were carried from the southeast under former adjustment; in other words, the Texas lines understand the agreement to be that they can carry the same rates if they deem it advisable so to do. The opinion, however, was pretty generally expressed that it was their desire to get the full advance of two cents from Texas-producing points to the territory named in the foregoing recommendation, but if this could not be done the members want it distinctly understood that they do not feel they would be violating any understanding if they should carry the same rates from Texas as apply from the southeast, based on the two-cent advance contemplated; but this adjustment may not comprehend an advance of two cents from all producing stations in Texas.

"In communicating the above I do so as chairman of the Southwestern Tariff Committee only. Matter of advance from Arkansas will, no doubt, be brought up at the next meeting of the Arkansas Freight Committee, which will convene at Hot Springs on Tuesday next, the 10th inst.

"Further, the undersigned has no voice in matters pertaining to rates from Louisiana points, so it would appear to him that it will be impossible to answer you intelligently with reference to advances from Arkansas and Louisiana until those lines are heard from.

"Yours truly,

"G. W. CALE, Chairman."

If, with the full permission of their several associates in this agreement to charge a differential of **two cents more** than the other lines, these Texas roads were content not to charge it, (R. V. II, 524), and to accept a per ton per mile of 4.4 mills to Cairo on this yellow pine lumber, such price was fixed by deliberate choice, and, therefore, manifestly profitable and reasonable.

In 1894 the cis-Mississippi lines, upon full consideration of the conditions west and east of the Mississippi river, made

Cairo the basic gateway, at a thirteen-cent rate, the then established rate from Arkansas, and this rate was continued in force until 1899, over five years.

It is contended, however, that this was a competitive rate, a "distress" rate, and, therefore, not a proper basis of adjustment. The facts we submit do not sustain this contention. Fortunately the case as then made was preserved, and it is made a part of the record in Mr. Gardner's evidence in this cause (R. V. II, p. 9-13). That the alleged depressed lumber market was not a factor is evidenced by the fact that the thirteen-cent rate to Cairo was made to adjust the relative rates between the east and west sides of the Mississippi river. The depressed lumber market, if any, would have effected the lumber manufacturers west as well as east, and if because of distress in the lumber market would have called for a reduction on the west side below thirteen cents. The testimony of Mr. Enochs shows that the effort was to obtain a market for the whole product of the mills east of the Mississippi river, and which, up to that time, had marketed only car sills and other structural timber north of the Ohio river, and to thereby put them on a parity with the mills on the west side. The object was to widen the area of the mill product, to expand the manufactured product as well as the territory for its commerce. The rate, thirteen cents, was then the normal rate of the Arkansas lines, established freely and voluntarily, and in the absence of competition by the cis-Mississippi roads, and therefore, should be the fair measure of reward for the service to the public.

There was no compulsion of the lines east of the Mississippi to adopt the basic, blanket theory in 1894 for the solution of this situation. It was their own voluntary device. No complaint is now made by complainants of this theory, and defendants, and especially Mr. Bowes, commend it (R. V. II, 491).

It is to be particularly noted that the rates to many points in the territory north of the Ohio river, as shown by the old tariffs, exhibit to Enochs' evidence (R. V. II, 639, 40), were lower in 1889-1893 than now, and they are, in many instances, just the amount of the recent two cent advance complained of; and this evidences that, if predicated upon a through rate, the fourteen cent rate to Cairo is a reasonable basis. Mr. Bowes was repeatedly asked whether as the Traffic Manager of the Illinois Central Rail-

road he would say that the conditions of 1889 should be made the basis for rates in 1902, and he would not commit himself to such a theory. (Enochs' R. V. II, 150, 1.)

The evidence does not sustain the theory that the rates of 1889, or those of 1893, should now prevail. The record shows marked improvement in the methods of operation, in the capacity of the cars, locomotives, bridges, rails, roadbed, grades and curvatures, so that as Mr. Enochs (R. V. II, 151, 2) testifies, a locomotive now on the I. C. Railroad could haul as much tonnage in one-half the cars as could have been done in 1893, and that its locomotives could now haul 50 per cent more tonnage than they could haul then.

It was contended that the years 1894-1899 were years of commercial and railroad depression, as an excuse for the rate, —thirteen cents,—then prevailing. This we have refuted, **supra**.

The evidence of Mr. Fish is that the Illinois Central (R. V. II, 462, 3) has and has had for years more traffic offered than it could haul; and that it has bought additional locomotives and equipment as fast as it could to try to handle this increased and increasing traffic. The evidence and the reports of the several railroads show the same thing.

The Commission reviewed the claim that the country was in 1902 suffering from commercial depression, and, also, the effect of the advance of wages, materials, etc., as factors whereby the grain rate should advance two cents, **In re Proposed Advances of Freight Rates,** 9 I. C. C. R., p. 382, and therein will be found a full exposition of the subject and an answer to this contention.

In **Grain Shippers Assn. v. Illinois Central R. Co.,** 8 I. C. C. R., p. 158, the Commission had under consideration a petition to require a reduction of two cents in grain rates, and the reduction was ordered. There the Commission had under review this period of depression, and its effect upon the Iowa branch lines of the Illinois Central, and it was there declared that this railroad depression existed from 1893 to 1897, but that in 1898 these Iowa lines had recovered; and, after finding that the roads could pay 4 per cent on $43,000 a mile, or 4 per cent upon more than enough to reproduce the property itself, the reduction of the two cent advance was ordered.

Thus, for five and one-half years the thirteen-cent rate to Cairo was charged by lines on both sides of the Mississippi river.

The Arkansas lines, however, while performing the same service, under similar conditions as the Mississippi lines, contended that they were entitled to a two-cent differential on lumber. After the blanket basic adjustment in 1894 the Arkansas lines **evaded the agreement** by allowing these tap line divisions, and were willing, voluntarily, to perform the service for as much less than thirteen cents as the tap line allowances amounted to.

This thirteen cent rate was advanced in 1899, after the commercial and railway conditions had been settled for more than a year, by adding one cent south of the Ohio river and one cent north of the Ohio river; thereby making the rate fourteen cents to Cairo, and ten cents from Cairo to Chicago, or twenty-four cents to Chicago; and thereby adding the gross advance of two cents per hundred to Chicago.

This rate of fourteen cents was in force from 1899 to 1903, or four years, as the fixed, reasonable return for the service. This tariff of April 15, 1903, makes the rate sixteen cents to Cairo and this is an advance of two cents **applicable entirely south of the Ohio river;** or, an advance of three cents south of the Ohio river since 1898, and of four cents to Chicago since 1894. It is to be noted that this advance in 1899 was made more than a year after all of the effects of commercial and railroad depression had passed and under normal conditions. Practically, the same conditions as to prices for lumber prevailed in 1903 as in 1899. This is set at rest by the Illinois Central's contracts for lumber filed as exhibits with Enochs' evidence, whereby the Illinois Central contracted for lumber at the same prices since 1899 (R. V. II, 169-170).

The advance of 1899 of one cent south and one cent north of the Ohio was fixed, voluntarily, by the carriers on both sides of the Mississippi river, and must be presumed to have been then a reasonable return for the services rendered.

This increase of two cents per hundred on the fourteen cent rate was an increase of 14 2-7 per cent. in the rate on lumber, (R. V. II, Ex. B, 614, 178), and was an increase of about $1,000,000 **per annum** imposed upon the mills in complainant's territory alone; and, in addition to what is admitted by defend-

ant's answer to be a profitable rate. The answer says of this fourteen cent rate, "Respondents admit that under previously existing rates, lumber was carried at a profit, but respondents aver and say that it was not an exceedingly profitable commodity."

There is no foundation in law or in fact for the profit of the carrier upon any freight being "exceedingly profitable."

It is inconceivable that an increase of 14 2-7 per cent. on what was already a profitable rate should not be unreasonable. If applied to the whole net revenue of the Illinois Central for 1902-3 it would increase its already plethoric net revenue by $4,370,399.18. (R. V. II, Ex. B, 614, 178.) The per cent. of advance from thirteen cents to sixteen cents is 23 per cent., which upon the gross revenue from freight of the Illinois Central 1902-3, would yield $7,059,714.07 (R. V. II, 178, 614).

Tested by the standard of Illinois Central, the basic line east of the Mississippi river, the fourteen cent rate was more than reasonable, though no complaint is made of it. The annual report of the Illinois Central to its stockholders, 1902-3, shows that the **average rate** per ton per mile on all revenue freight was 5.91 mills per ton per mile (R. V. II, 179). No charge in this was made for the haul of company material; but it was covered in operation expenses. The company freight, for which no charge was made, was 13.98 per cent. of the gross revenue freight tonnage. In every average train load of 288.19 tons there was 46.85 tons of company material in 1902-3, evidencing the abnormal extent of improvements in double tracking, eliminating of grades and curvatures, etc., and thereby increasing expenses for permanent improvements and decreasing net income. For the years 1901-2 this exaction was 15.37 per cent.

Taking as a basis this average of the Illinois Central of all commodities of 591 mills per ton per mile, and applying the rule announced by the Commission in **Marten v. L. & N. R. R. Co.**, 9 I. C. C. R., 589, "Lumber is inexpensive freight and much below the average in cost of transportation, while only a few other commodities furnish to carriers a larger tonnage. For these reasons, among others, it is universally accorded rates of transportation that are relatively low," and this supported by the annual report of the Southern Railway for 1905, p. 16, referring

to the classification of tonnage, says, "The low class of traffic hauled, such as products of mines, products of forests, iron—pig and bloom, nails, cement, brick, lime, etc., constituted," etc. This quotation is admitted to be correct. Stip. Par. XXIII, (R. V. I, 432) and the Commission and the Court has so found, and, hence, the rate per ton per mile on lumber should be below the average rate of 5.91 mills.

The rate per ton per mile via the Illinois Central, the basic line, to Cairo from McComb City on the Illinois Central, and from Hattiesburg on the Gulf & Ship Island, admittedly representative points, at sixteen cents, less two cents bridge toll, is 6.4 and 6.3 mills per ton per mile (Op. Com., R. V. II, 966); or, an increase of five per cent. over the **average** of **all** revenue freight. At fourteen cents, less two cents for bridge arbitrary, owned by Chic., St. Louis & N. O. R. R. Company, the rate per ton per mile would be 5.37 mills, or .086 mills below the average of all commodities. When we consider that the rate per ton per mile on cement frow New Orleans is 2.82 mills, and on coal, 3.60 mills per ton per mile, (Centralia to N. O., I. C. C., No. E., 264) and on pig iron, 3.60 mills (Robinson's Ev., R. V. II, 94, 57), these last two being admitted by Judge Baxter in argument in the Georgia case to be substantially similar commodities to lumber, it is apparent that lumber is above its companion commodities at the fourteen cent rate with 5.37 mills per ton per mile.

The Commission holds (R. V. II, 998) in confirmation of the evidence of Mr. Enochs and Mr. Gardiner, **supra:**

> "II. As said in **Marten v. L. & N. R. R. Co.,** 9 I. C. R. R., 589, and shown by the proof in this case, 'lumber is an inexpensive freight and only a few other commodities furnish to carriers so large a tonnage.' The lumber business is constant, yielding the carriers revenue all the year; no special equipment is constructed or furnished for its carriage; it is loaded by the shipper and unloaded by the consignee, and where open cars are furnished, the shipper is required at considerable expense to equip them so as to protect the load and the train; there is small risk incident to its transportation and, in case of accident, the damage is insignificant. For these reasons lumber should be given rates which are relatively low."

As shown by the Division Sheets, exhibit to Mr. Gardiner's evidence, and comparison of earnings of Illinois Central Railroad and Gulf & Ship Island Railroad, to Cairo, Ill., on the fourteen cent and sixteen cent basis, the Gulf & Ship Island received of the fourteen cents and sixteen cent rate seven cents for an average haul of eighty miles, or, $1.40 per ton, or, 1.75 cents per ton per mile (Op. Com., R. V. II, 965). The Illinois Central received for 366 miles of the fourteen cents, seven cents, less two cents bridge, makes five cents, or, 3.8 mills per ton per mile. Thus, by voluntary agreement the Illinois Central was willing to carry one-half of its lumber to Cairo at this rate, about the same rate as on cement, and to pay the Gulf & Ship Island this extraordinary per ton per mile of 1.75 cents for the privilege of doing so. "Transportation by rail is a service of quasi-public nature, not to be sold to the highest bidder, nor subject to the law of supply and demand." **Proposed Adv. Freight Rate, supra,** p. 405.

In **Nat. Wholesale Lbr. Dealers Assn. v. Norfolk & W. Ry.,** 9 I. C. C. R., p. 115, it was held that the division of the lumber rate of the Penn. R. R., "exceeds the standard of reasonableness." There the distance from Hagerstown to New York was 271 miles, for which the Penn. R. R. received a division of thirteen cents, p. 102; while, for an average of eighty miles the Gulf & Ship Island receives seven cents.

Mr. Barnett, formerly general freight agent of New Orleans & Northeastern R. R. Co., and familiar by long experience with these matters, testified (R. V. II, 533-4) that as between coal and cement and lumber that lumber was largely more profitable. He prepared a comparative statement, exhibit to his evidence, of the rates, value, etc., of the principal commodities moving north from New Orleans, viz., sugar, salt, naval stores, rice, tropical fruits, etc., with lumber, and lumber stood unreasonably high in the classification as a revenue producer.

Mr. Barnett's Ex. (R. V. II, 682-3) shows a comparison between rates on coffee, sugar, rice, molasses, cement, salt, naval stores, tropical fruits, and lumber products of the South, the principal freights of Illinois Central (R. V. II, 492) as follows:

Rate from New Orleans to Chicago—

Coffee.	Rice.	Molasses.	Cement.	Salt.	Rosin.	Lumber.
22c	28c	25c	13c	19c	25c	26c

Under the twenty-six cent rate it costs $5.20 to transport a ton of yellow pine lumber to Chicago. To transport a ton of cement from New Orleans to Chicago costs $2.60 a ton. To transport a ton of coal from Birmingham to New Orleans, 349 miles, costs $1.25 (R. V. II, p. 95).

By Mr. Enochs (R. V. II, 170, 1) it was shown that of the three classes of yellow pine lumber the value of the low grade was less than the freight; that of the medium, about equal to the freight; and that of the high grades in excess of the freight; and also the loading of yellow pine lumber.

By Ex. 18 (R. V. II, 625-31), Mr. Enochs showed from actual transactions in his own business the relative amounts and freight earning capacity of the tonnage of divers common commodities, such as cypress lumber and shingles, oak lumber, coal, sash weights, window glass, cement, lime, fertilizer, cotton seed meal and hulls, live stock and furniture, compared with yellow pine lumber, whereby is shown (R. V. II, 625) that with fifteen cars cypress 81.11 per cent. of car capacity was used; value of cargo, $28.75 per M; proportion of freight to value, on twenty-six-cent rate, 24.54 per cent.; same, on thirty-one cent rate (that being the rate used on Niagara Falls Ex. of **yellow pine**) (R. V. II, 536, 623) 27.91 per cent. With oak lumber 78.47 per cent. (R., Id., 626) of car capacity was used; price $60.18 per M; proportion of freight to value on twenty-six cents rate, 16.21 per cent. Cypress shingles, 67.75 per cent. of car capacity utilized (R., Id., 626); proportion of freight to value 39.60 per cent. Sash weights, 63.38 per cent. (R., Id., 626) of car capacity was used; proportion of freight to value on twenty-six cent rate, 20.50 per cent. Window glass, car capacity used, (R., Id., 627) 70 per cent.; proportion of freight at twenty-six cent rate to value, 8.25 per cent. Cement, (R., Id., 627), car capacity used, 63.32 per cent.; proportion of freight to value, 37 per cent. Lime, car capacity used (R., Id., 628), 44.32 per cent. Fertilizer, car capacity used, 66.79 per cent. (R., Id., 628), Live stock, car capacity used, 40.6 per cent.; proportion of freight to value, 10 per cent. (R., Id., 629). Cotton seed hulls, car capacity used, 45.93 per cent. (R., Id., 629.) Cotton seed meal, car capacity used, 55 per cent.; proportion of freight to value, 4 per cent. (R., Id., 630). Coal, shipped from

Sturgis, Ky., to Jackson, Miss., car capacity, 35 tons average; (R., Id., 630); car capacity used, 86.31 per cent.; freight yield per car, $48.34. If lumber was returned to Sturgis from Jackson, the rate being twenty-one cents per hundred, it would only take 11.5 tons of lumber to yield $48.34; with 30.21 tons, the average load of lumber, each car would have earned $126.88 per car; excess in favor of lumber, $78.54. Furniture, car capacity used (R. V. II, 630), 28.33 per cent. (instead of 44.23 per cent. as miscopied on the exhibit); average earned per car between Chicago and Jackson, Miss., at eighty cents per hundred, $106.02. With lumber at twenty-four cents, loaded on the same cars, of 60,000 pounds capacity (as per loading average claimed by Mr. L. Green (R. V. II, 215) to 83.3 per cent. stenciled capacity) each car would yield $119.95, or an excess of $13.93 per car, in favor of lumber. Total average loading of these thirteen commodities shows 60 per cent. of stenciled capacity. The opinion of the Commission (R. V. II, 985) confirms as correct these exhibits.

By Mr. Enoch's evidence the average loading and earning capacity per car is given on compressed cotton, cottonseed oil and live stock as compared with yellow pine lumber, viz. (R. V. II, 540, 633, 4.):

Compressed cotton exhibit shows the rates on cotton and lumber from Jackson, Miss., to ten representative points in Central Traffic Territory, the average of the rates on cotton being 51.9 cents per hundred; on lumber, 29.65 cents per hundred, or 11.75 per cent. higher on cotton than on lumber. The best average loading of cotton upon said exhibit shows 51.6 bales, or 25,800 pounds; or, 40.23 per cent. of the box car capacity of the Illinois Central in 1903, or, 12.60 tons per car; therefore, with lumber loaded to 22.05 tons, or 44,100 pounds per car, its earnings equal the average car load of cotton. Compared with Enoch's lumber loading of November, 1903, 52,000 pounds per car, cotton earns, per car, as 100 is to 117 per cent. in actual performance (R. V. II, 633).

Cottonseed oil, two cars, average weight, 48,500 pounds, at twenty-five cent rate, earned $121.25; twenty-two cars of oil shipped from Laurel, 1902-3, average weight, 52,630 pounds per car; if shipped to Chicago on twenty-five cent rate, per car, $131.-

57, or $2,894.54; the same tonnage in lumber between same points at twenty-five cent rate, a four per cent. higher rate than cotton seed oil, gives $2,557.28, or $663.04 in favor of lumber. Compared with exhibit showing twenty open cars of lumber from Fernwood, $198.14 per car, (Id. 625) we have $78.62 per car in favor of lumber on this open car traffic. (R. V. II, 632).

The exhibit of Mr. Enochs of comparison of double loaded lumber and live stock shipped to St. Louis (R. V. II, 631, 290), shows seven double loaded cars of lumber and six cars live stock, wherein:

Lumber, earned per car, average	$94.18
Cattle, earned, per car, specific	75.00
Excess in favor of lumber per car	$19.18
or 25.57 per cent.	

If Mr. L. Green's average for lumber car loading be accepted, 83.3 per cent. of stenciled capacity, (R. V. II, 215) we would have the earnings on lumber per car of Illinois Central to Chicago as follows:

Stenciled Capacity.	Per Cent. Used.	Lbs.	Rate.	Earned Per Car.
40,000	83.3	33,320	24c	$ 79.96
50,000	83.3	41,650	24c	99.96
60,000	83.3	49,980	24c	119.96
80,000	83.3	66,640	24c	159.93
100,000	83.3	83,300	24c	199.98

The earnings per car from Chicago to New York, the same distance as from New Orleans to Chicago was found in **Proposed Advance in Freight Rate Case,** 9 I. C. C. R., p. 99, to be as follows:

Packing house products, per car	$ 90.00
Dressed beef, per car	99.00
Grain, 65,000 lbs., per car	113.75

When the difference in the character of the traffic, as between lumber, and dressed beef, and packing house products, and live stock, and cotton oil, etc., is considered, it is manifest that this twenty-four cent rate to Chicago was an exceedingly liberal one to the carrier.

If the principle upon which the local lumber tariff No. 741 of Ill. C. R. R. Co., from New Orleans to within twelve miles of Cairo Junction (see exhibit 21 to Mr. Enoch's evidence) (R. V. II, 635, 543; certif. E. A. Moseley, R. V. I, 490-1) is accepted as a proper basis for making rates, then that shows that the Ill.C. R. R. Co. increases its rate on local shipments of lumber from the initial point in this ratio:

Over 5 to 10 miles, an increase of 1c for 5 miles,
Over 10 to 50 miles, an increase of 1c every 10 miles,
Over 50 to 240 miles, an increase of 1c every 20 miles,
Over 240 to 320 miles, an increase of 1c every 40 miles,
Over 320 to 550 miles, an increase of ½c (blanket for 230 miles.

Cairo Junction is 562 miles from New Orleans. So the local tariff is made on the principle that the increase of the rate decreased in proportion to an increase of the distance.

This local tariff shows that after transporting 100 pounds of lumber 320 miles over its own line, it is profitable to transport it a blanket distance of 230 miles at one-half cent per hundred.

If application of this local tariff basis is made to through shipments of lumber over the whole line of the Illinois Central treating it, according to former practice, as a continuous line, it would result that the through rate from McComb City to Chicago should be 21c, and to Dubuque, Ia., 21.5c, and to Iowa Falls, Ia., 22c.

Thus:

McComb City to Chicago, distance ..... 818.36 miles
Local tariff No. 741 for 320 miles ..... 19.5c for 320 miles
At ½c for each 230 miles of 498 miles ..... 1.5c for 498 miles

Total rate to Chicago on local tariff basis .. 21c

McComb City to Dubuque, over I. C. R. R. ..... 904 miles
Local tariff for 320 miles ..... 19.5c for 320 miles
½c for each 230 miles of 584 miles ..... 2c for 584 miles

Total rate Dubuque on local tariff basis 21.5c

McComb City to Iowa Falls over I. C. R. R. ..... 1171 miles
Local tariff for 320 miles ..... 19.5c for 320 miles

½c for each 230 miles of 851 miles ..... 2.5c for 851 miles

Total rate upon local tariff basis to Iowa City, Ia. 22c

The cottonwood and gum tariff, effective Oct. 5, 1902 (R. V. II, 600—699) of Yazoo & Mississippi Valley Railroad with Illinois Central Railroad, in connection with nearly every railroad in this territory, fixes the rate to Cairo at ten cents, to Evansville, ten cents, to Cincinnati thirteen cents, to Chicago sixteen cents, from every place on Y. & M. V. R. R. in Mississippi, both north and south of Vicksburg, including Harriston, Miss., Hamburg, Miss., Roxie, Miss., (**Id.** 606), and other interior places in Mississippi. The same tariff shows a rate from Hanson City, La., to Chicago, twenty cents, to Cincinnati, eighteen cents, to East St. Louis, fifteen cents, and from Vicksburg, Miss., to Indianapolis, Ind., twenty cents. Under this tariff from Hanson City, La., to Chicago, it appears (**Id.** 699, 68):

Cottonwood rate to Chicago, 20 cents for 913 miles.
Yellow pine, rate to Chicago, 26 cents for 807 miles.
Cottonwood, rate, per ton per mile.....438 mills.
Yellow pine rate, per ton per mile.....644 mills.
A ton of cottonwood yields.....$4.00 freight
A ton of yellow pine yields..... 5.20 freight
or, 47 per cent. more on yellow pine lumber than on cottonwood.

Under the twenty-six cent rate it costs $5.20 to transport a ton of yellow pine lumber to Chicago. To transport a ton of cement from New Orleans to Chicago costs $2.60 a ton. To transport a ton of coal from Birmingham to New Orleans, 349 miles, costs $1.25 (R. V. II, 95).

A comparison of the freight on a ton of lumber from Redwood, Miss., (near Vicksburg) and a ton of lumber from Jackson, Miss., to Kensington and Peoria, Ill., via Y. & M. V. R. R. and Illinois Central, shows (R. V. II, 614):

A ton from Redwood yields $3.60;
A ton from Jackson yields $5.20.
A ton of cypress lumber from Lutcher, La., to St. Louis yields $2.40, while a ton of yellow pine lumber yields to the same point, $4.00 (R. V. II, 614).

Exhibit 17 to Mr. Enochs testimony shows (R. V. II, 625), that on twenty cars of yellow pine lumber shipped just prior to April 15, 1903, the loading was 102 per cent. of the stencilled capacity of cars, and that at the twenty-four cent rate, they yielded, per car, $182.91 freight.

The rate per ton per mile on coal on Illinois Central is less than four mills. Bowes, R. V. I, 141.

Many other like illustrations are furnished by the record and exhibits.

The Illinois Central and others, in answer to the petition before the Commission, state: "Respondents admit that under previously existing rates" (fourteen cents) "lumber was carried at a profit, but respondents aver and say that it was not an exceedingly profitable commodity."

So, when the Illinois Central admits that it was carrying this lumber under the rate yielding as to 50 per cent. (Gulf & Ship Island part) 3.8 mills per ton per mile at a profit, and Mr. Bowes admits in his evidence (R. V. II, 487) that it was profitable, it could not be justified in increasing a rate yielding 6.3 mills per ton per mile, by the sum of two cents per hundred pounds.

The per ton per mile on yellow pine lumber, via Illinois Central or New Orleans & Northeastern was, as found by the Commission, as follows (R. V. II, 965):

From Hattiesburg—				From McComb City—			
To	Miles.	Rates.	Rates per ton per mile.	Miles.	Rates.	Rates per ton per mile.
Cairo	432	16c	7.4 mills.	444	16c	7.2 mills.
Evansville	578	22c	7.6 mills.	584	22c	7.5 mills.
Louisville	622	21c	6.7 mills.	643	21c	6.5 mills.
Cincinnati	709	23c	6.4 mills.	757	23c	6 mills.

Under the rates in force prior to April 15, 1905, the per ton per mile was as follows:

To Cairo, 6.4, from Hattiesburg; and 6.3 from McComb City

Hattiesburg and McComb City were found to be representative points by the Commission.

The Commission, in its wide experience, finds Peoria, Indianapolis, Columbus and Chicago as representative points in Central Association territory upon which to base the per ton per mile on lumber. There is no attempt to disprove by any additional evidence that they are representative points and show a fair average. Lumber to these points by the shortest available lines from representative shipping points in Mississippi, Alabama and Louisiana, east of the Mississippi river, produces, as found by the Commission a per ton per mile as follows:

To Peoria.....6.45 mills per ton per mile,
To Indianapolis .....6.77 mills per ton per mile,
To Columbus.....6.25 mills per ton per mile,
To Chicago .....6.07 mills per ton per mile.

The average per ton per mile propounded by counsel was 5.59 mills. There is no evidence to show that Peoria, Indianapolis, Columbus and Chicago are not fair representative points for the movement of lumber. Counsel below conceded these to be representative points. The vice of this 5.59 per ton per mile is that it is based on an **average**, and whereby the longest haul is made to measure the reasonableness of that rate of the shortest line. The **average** earnings of the citizens of Washington might make a reasonably fair income for the average man; but this average is of little value as a standard, if one man of the 200,000 population earned $100,000,000 per annum, and the 199,999 men earned $100 per annum. There is no evidence tending to show that the Commission's and the Court's finding on this proposition is not correct.

These places, and this per ton per mile so found by the Commission, must stand until they were disproven. Therefore, the average per ton per mile on yellow pine lumber, having been confirmed by the Circuit Court, must stand as found, 6.38 mills per ton per mile from Hattiesburg and 6.1 from McComb under the 14c rate. (R. V. II 966.)

This is far in excess of what would be reasonable, though it is not complained of. Concededly, lumber is far down in the classification of freights—it is low class traffic, much below the average, but as a rate bearer it is made above the average.

The average per ton per mile of the Illinois Central,

on all classes of traffic, for 1903, was 5.91 mills; for 1904, 6.07 mills (Illinois Central An. Rep., 1904, p. 14, table 7); for 1905 (Illinois Central An. Rep., 1905, p. 14, table 7), 5.89 mills; so, with 6.38 or 6.10 mills on lumber, lumber exceeds the average. (Note V. I, 432, par. XXIV of stipulation admits these figures.)

It was claimed in argument that 559 was as low per ton per mile as could be found in the United States, but this is an error. The exhibit to Mr. Gardiner's evidence (R. V. II, 660, **et seq.**) shows a number of rates per ton per mile much below 559 mills.

For example, Kirbyville, La., at eighteen cent rate, 327 mills; Silsbee, Tex., 337 mills; Beaumont, Tex., 33 mills; Lumber City, Ga., to Cairo, 359 mills; Empire City, Ga., to Cairo, 380 mills; Baxley, Ga., to Cairo, 35 mills; Pinero, Ga., to Cairo, 353 mills; Heart Pine, Ga., to Cairo, 365 mills (R. V. II, 661).

Comparison of the service rendered by the Illinois Central for one cent per hundred pounds of lumber, **north** and **south of the Ohio,** for the Cairo and Chicago rates, shows that **much less service** is rendered **south** of the Ohio river than **north** for the **same price.**

Under the twenty-two cent rate the number of miles hauled north of the Ohio and south of Ohio for one cent was equal; under the twenty-four cent rate the haul was 1.1 miles longer south than north. Under the twenty-six cent rate the haul for one cent is 4.4 miles less south than north. Thus:

CAIRO JUNCTION TO CHICAGO.

Chicago Division

Rate.	North.	Miles.	Miles.	
22c	9c	361	40	100 lbs. is carried for 1c
24c	10c	361	36.1	100 lbs. is carried for 1c
26c	10c	361	36.1	100 lbs. is carried for 1c

McCOMB CITY TO CAIRO JUNCTION.

Southern Division

Rate.	South.	Bridge.	Miles	Miles.	
22c	13c—2c-11c		444	40	100 lbs. is carried for 1c
24c	14c—2c-12c		444	37	100 lbs. is carried for 1c
26c	16c—2c-14c		444	31.7	100 lbs. is carried for 1c

Thus, the same railroad, under this twenty-six rate, sells 4.4 more miles of service north than it does south of the Ohio river for the same price. This shows that the fourteen cent rate to Cairo, and the twenty-four cent rate to Chicago was ample; for this rate still stands north of the Ohio, i. e., 36 miles for one cent, while south the price has increased, so that only 31.7 miles are sold for 1c, a decrease of about thirteen per cent. This advance of two cents showed an **increase in the rate of** $14\frac{2}{7}$ per cent., (Ex. B, R. V. II, 614), and these figures show a **decrease of 13 per cent. in the mileage sold** for the same price south of the Ohio.

The haul is continuous by the Illinois Central, and the originating division south of the river bears all the expenses of loading, etc., and the whole bridge charge at Cairo, of two cents, is deducted from the division south of the river. (R. V. II, 481.)

Mr. Robinson testified, without contradiction, that the rate per ton per mile on coal from Birmingham to New Orleans was 3.60 mills per ton per mile; on pig iron, 3.60 mills per ton per mile; on cement, 2.82 mills per ton per mile. (R. V. II, 94, 5.)

In **Proposed Advance in Freight Rates** case, **supra,** a rate per ton per mile on grain of 3.88 mills was found to be very profitable. Grain should bear a higher rate per ton per mile than lumber, as there is more risk in transportation, and a greater degree of care is necessary both in the use and character of cars and their management.

The evidence, Enochs (R. V. II, 173), shows these advantages for yellow pine lumber as traffic.

(1st) Low value; (2d) heavy tonnage; (3rd) low cost of handling; (4th) constancy of the traffic; (5th) slow moving freight; (6th) adaptability of all equipment to its movement; (7th) indestructibility; (8th) no damage claims; (9th) no special cars are designed for lumber;—grain and coal cars, designed primarily for those articles, and with lumber for the return, or complement, haul—the cars being used for a two-way haul; (10th) long haul loads; (11th) full trains—thereby giving a distribution of rolling stock; (12th) Mr. Hudson's statement that ten years ago 64 per cent. of the cars came out of New Orleans empty, and that now

cars had to be hauled south empty for import business; (13th) that by Interstate Commerce report for 1901, p. 67, the freight car mileage for the year ending June 30, of loaded cars and empty cars is in favor of group 5; (14th) shippers load and no station expenses; (16th) use of open cars, and shipper required to make equipment capable of transporting freight by stakes, etc.

The statement made by Mr. L. Green, of the Southern (Ex. 9, R. V. II, 903), to show the rate per ton per mile on lumber in other parts of the country is misleading, in that he states that there was movement between some of the points named and between others there was no movement. Examination shows that between nearly all of the points named there was no movement, and that the rates as a rule were paper rates, and its correctness is controverted. (Enoch's R. V. II, 549.)

The comparison with the lumber rates recited in the **Norfolk & Western** case, 9 I. C. C. R., p. 93, shows that even with lumber moving east over the mountains there was a rate to New York of less than that of twenty-four cents to Chicago. And **Id.,** p. 31 it is said:

> "Rates to New York City from Saginaw, Muskegon, Grand Rapids and Manistee, Michigan, and Logansport, Elkhart, Fort Wayne, Indianapolis, Ind., together with the length of the haul in each instance, were introduced by complainant for the purpose of comparison with the N. & W. rates. The length of the haul from each place named is greater than from any point on the N. & W., and it will be found, under the rule of decreasing rate per ton per mile with increasing distance, that lumber rates from these Indiana and Michigan points are relatively much less than those from N. & W. points, and somewhat less than those from either C. & O. or B. & O. points."

The rates referred to are as follows. **Id.,** p. 93 (R. V. II, 527):

Distance Miles.	Point of Shipment.	Dest. N. Y. City.	Rate in Cents.	Rate per ton per mile.
753	Saginaw, Mich.	"	21	558 mills.
843	Muskegon, Mich.	"	22	552 mills.
805	Grand Rapids, Mich.	"	22	547 mills.

902	Manistee, Mich.	"	24	532 mills.
834	Logansport, Ind.	"	24	576 mills.
848	Elkhart, Ind.	"	24	566 mills.
764	Fort Wayne, Ind.	"	22½	589 mills.
825	Indianapolis, Ind.	"	23	558 mills.

In **Proposed Advance in Freight Rates,** 9 I. C. C. R., 396, it is said:

> "The rate per ton per mile, while often instructive, is not by any means a fair index of a reasonable rate. The cheapest traffic is frequently most profitable to the carrier."

And the Chesapeake & Ohio for 1901 was instanced as having over its whole system an average rate of 3.88 mills per ton per mile, and that on this basis its net earnings yielded 6 per cent. on a capitalization of $60,000 per mile. Says the Commission, "indeed it is usually a question, not of the absolute rate, but of the conditions under which the traffic is handled."

Mr. Enochs preserved some of the old tariffs 1889-1903 of the Illinois Central, and they were put in evidence as Exhibit 20. At the request of Judge Prouty he made and filed tabulations therefrom, and for reference they are made appendices A, B and C to this brief. (R. V. II, 639, 40; see certificate Edw. A. Moseley, Sec'y. of Com., R. V. II, 486-491.)

Appendix A (R. V. II, 639) shows:

That by the tariff of the Illinois Central and connections, dated Aug. 19, 1889, No. L. 955, to fifty stations named thereon, the rate in 1889 was 26c and that of April 15, 1903 (I. C. R., B., 8110), 29c, an excess of 3c in the present rate (R. V. I., 486);

That by Tariff No. M 100, dated March 3, 1892, Ill. Cen. with C. C. C. & St. L. to thirty named stations thereon, the rate was 20c, the present rate an increase of 2c. That by tariff No. M 253, May 21, 1893, same roads, stations taken twenty-seven, old rate 23c, present rate 24c-26c, an advance 2c-3c (R. V. I, 486);

That by Tariff No. M., 42, dated Sept. 22, 1892, Ill. Cen. with O. & M. R. R., to forty-two named stations there was a rate of 22c and 23c, present rate 24c and 26c, increase 2c-3c (R. V. I, 487);

That by Tariff No. M., 30, dated Sept. 9, 1892, Ill. Cen. with St. L. & T. H. R. R., to fifty-three named stations, old rate 20c, present rate 20c to 23c, increase 3c (R. V. I, 487);

That by Tariff No. L., 3571, dated Aug. 24, 1892, Ill. Cen., with Minn. & St. L. R. R., C. M. & St. P. R. R., stations taken fourteen, old rate 29c, present rate 33c, increase 4c; same, stations taken thirty-seven, old rate 29c, present rate 30.5c, 33c, 30c, 33c, increase 1c to 4c; same, with C. G. W. R. R., stations taken forty, old rate 29c, present rate 33c, increase 4c; same, with C. B. & N. R. R., stations taken 37, old rate 27c, present rate 33c, increase 1½c to 4c (R. V. I, 487);

That by Tariff No. M., 54, dated Otober 4, 1892, Ill. Cen. with C. & N. W. R. R., stations taken sixty-four, old rate 26c, present rate 26c to 29c, advance 3c (R. V. I, 487);

That by Tariff No. M. 54, dated Oct., 4, 1892, Ill. Cen. with C. & N. W. R. R., stations taken 64; old rate 26c, present rate 26c to 29c—advance 3c. (R. V. I. 487.)

That by Tariff No. M. 81, of Ill. Cen. with Wabash, between Toledo and Woodburn, Ind., stations fourteen, old rate 26c, present rate 30c, advance 4c; same, between New Haven, Ind., and Peru, Ind., stations twenty-four, old rate 25c, present rate 27c-31c, advance 2c-6c; same, to Logansport, Ind., old rate 24c, present rate 27c, advance 3c; same, Detroit and other stations, stations taken forty-five, old rate 24c, present rate 30c, advance 6c (R. V. I, 488);

By Tariff No. M. 82, Ill. Cen. with Mich. Cen. and Wabash C. & W., between Willow Creek, Ind., to Detroit, stations four teen, old rate 24c, present rate 28c-30c, advance 4c-6c (R. V. I, 488); By Tariff No. M. 258, Ill. Cen. with C. B. & E. R., stations taken ten, old rate 24c, present rate 26c, advance 2c (R. V. I, 488);

Appendix A, by these tariffs of 1889-1893, shows by the 533 stations taken, that the rate is from 2c-6c higher under this advance than it was then.

By Appendix B hereto (R. V. II, 640; V. I, 489) is shown a compilation of the sheet tariffs to individual stations in 1892-3, and thereby it appears that this advance rate, under I. C. R., R. B., 8110, varies in increase from 1.5c-7c over these rates in 1892-3. The rate to Indianapolis in 1893 is shown by this Appendix B, to have been 21c, while the present rate is 26c; thus illustrating clearly the effect of these advances.

Appendix C hereto (R. V. II, 640; V. I, 488-9) is a comparison of Tariff No. M. 24, of Illinois Central, effective Sept. 29, 1892, with I. C. R., R. B., 8110, the tariff of the present advance. It takes seventeen representative points out of the 403 there listed, and it shows that the present rate is from 2.5c to 8c in advance of the rates in 1892. It also shows that the then rate to Cairo was 15c; to Chicago, 24c; and thus, that the basing on Cairo, with locals added beyond, was not then the basis of the rate. These tariffs are especially instructive as to the rates in force from 1889 to 1893, and were made as the **independent judgment** of the Illinois Central before the basing blanket scheme was devised, and without reference to agreements.

The further comparison of cottonwood and gum with yellow pine lumber rates is also instructive (R. V. II, 600-609).

By Ill. Cen. Tariff, I. C. R. R., 1671, **effective Oct. 5, 1905,** the rates upon cottonwood from a great number of stations, many of them without possible water competition, shows that with a rate of 20c from Hanson City, La., to Chicago (913 miles) cottonwood yields 4.38 mills per ton per mile (R. V. II, 609); and at 26c from McComb City (807 miles) yellow pine lumber yields 6.23 mills per ton per mile;

By Sup. 32 to N. 1627, I. C. C., 1220, **effective June 2, 1902,** (see certif. E. A. Moseley, Sec'y., R. V. I, 489) on gum and cottonwood, from stations on A. & V. Ry., and N. O. & N. E. Ry., with C. B. & Q. Ry. and M. & O. R. R., the rate to Chicago was 21c, to East St. Louis and St. Louis 14c; on common lumber, other than pine, cypress, gum or cottonwood, to Chicago was 21c, to St. Louis and East St. Louis, 15c.

Thus showing that Mr. Enochs' extension of Ill. Cen. local tariff No. 741 to Chicago at 21c is logically correct.

By Tariff Sup. 36 to N. 1627, I. C. C., 1220, **effective Nov.**

1, 1902, (see certif. E. A. Moseley, Sec'y., R. V. I, 490) from stations on A. & V. Ry. and N. O. & N. E. Ry., except Vicksburg, Jackson and Meridian, with Chicago B. & Q. Ry. and Mobile & Ohio R. R., on gum and cottonwood, to Chicago 22c, to East St. Louis and St. Louis 16c, with **same rate on common lumber other than pine, cypress, gum or cottonwood.**

Tariff Sup. 37 to N. 1627, I. C. C., 1220 (see Moseley's certif., R. V. I, 490) is identical with Sup. 36, **supra,** except that it includes the Illinois Central to Chicago 22c, to East St. Louis and St. Louis, 16c.

Thus, on **Nov. 1, 1902,** the Illinois Central and the Mobile & Ohio made a rate from Alabama & Vicksburg and New Orleans & Northeastern R. R. points, wholly unaffected by water competition, on cottonwood, gum and other common lumber, except pine and cypress, of 22c to Chicago, and of 16c to St. Louis, and by the tariff agitated at St. Augustine and New Orleans in **December, 1902,** yellow pine lumber is advanced to 26c to Chicago, and to 20c to St. Louis—a difference of 4c per hundred.

By Sup. 134 to A-3550, I. C. C., 1033, **effective July 31, 1902,** exhibit to Enochs' evidence (R. V. II, 614), the lumber rate from Redwood, Miss., to Kensington, Ill., 722.5 miles is 18c; the rate from Jackson, Miss., to Kensington is 26c, distance, 714.22 miles. The Redwood rate yields 4.98 and the Jackson rate, 7.28 mills per ton per mile; or an increase of 46 per cent. per ton per mile.

By Sup. 125, to I. C. C., 1033, exhibit to Enochs' evidence (R. V. II, 614) a comparison of the rate on cypress from Lutcher, La., and yellow pine from McComb City to St. Louis is made, showing rate on cypress 13c, on yellow pine 20c, or on cypress, 33 mills, and on yellow pine 66 mills per ton per mile.

The evidence shows that there was no actual water competition regulating these rates on cypress and cottonwood, and they are, therefore, the more instructive as to the reasonable worth of the service rendered.

The system of shipping lumber is set forth in Mr. Butterfield's evidence, (R. V. II, 144) to be that the shipper is required to make a requisition for such car or cars, and of such capacity as is

required for his cargo. Under this requisition the carrier furnishes the cars; and, if for any reason a larger car is furnished than the requisition calls for, the loading deficiency onus should be on the carrier. The mere fact that gondolas, or even box cars up to 60,000 lbs. capacity, are not loaded to stenciled capacity, is of little probative force, unless coupled with evidence that the shipper made requisition for a car of that capacity, and then failed to load it to capacity. Besides, if the shipper fails to load cars to capacity, the remedy is in the hands of the carrier by penalizing under-loaded cars.

Deficiency of loading to capacity, if any, is imputable to negligent administration of operation. If cars of proper size are not furnished, or if furnished are improperly loaded, or if properly designed equipment is not provided, the responsibility is with the carrier and not the shipper.

The evidence of Mr. L. Green (R. V. II, 215) shows that on the Southern 83.3 per cent. of stenciled capacity was used in lumber shipments. When this is compared with the great body of other products, and especially, when box cars of over 60,000 lbs. of stenciled capacity cannot, by reason of the deficiency of cubical capacity, be loaded to stenciled capacity (Mr. Gardiner, R. V. II, 32, 3; Mr. Enochs, **Id.**, 161-5), this average should be satisfactory. As to cars of 80,000 lbs. and over, according to the rules of the I. C. R. R., for loading coal, 72,000 lbs. is to be considered a load, and this would be 10 per cent. short of the capacity of an 80,000 and 28 per cent. of an 100,000 lbs. car. Exhibit 17 to Mr. Enochs' evidence (R. V. II, 625, 537) for the shipment of lumber to the Coal Storage Company, in March and April, 1903, shows gondola cars of 100,000 to 40,000 lbs· capacity with loadings in excess of the stenciled capacity, of 102 per cent.

The number of 100,000 lbs. cars even now in use on the defendant company's roads are few, and are confined to a few coal cars on the Illinois Central.

The Hand Book, No. 6 of the Southern Railway, p. 65, Ex. 14 to Mr. L. Green's evidence, shows that there are divisions of the Southern which require special arrangements and low speed to haul this class of equipment, and that on some of its divisions it cannot be hauled. The stipulation as to the record (R. V. I, 420) admits this to be true.

Few of the defendants have any 80,000 pound cars, in fact, none of them except the L. & N. and Illinois Central.

Until there shall be equipment so designed as to take care of lumber to its full stenciled capacity, and the system of loading is so changed as to relieve the carrier of responsibility for short loading, the deficiency of loads below stenciled capacity is curable by correction of the carrier's own methods and equipment, and cannot be made the basis for the increase of rates on lumber. "So far as this is due to the failure of the carrier to provide cars of proper size the shipper is not to blame." **Proposed Advance Freight Rates, supra,** p. 432.

The congested condition of the traffic during 1902-3 and prior to and since that time, by reason of the enormous volume offered, has been, as shown, **supra,** a fruitful source of increased expense of operation and of the falling off of net income. The annual reports of the Southern, and of the Illinois Central, and, especially, Mr. Fish's evidence, **supra**, show that these railroads have and have had more freight offered than they could handle, even though there has been a very large increase of motive power, cars and facilities for transportation.

These results of inefficient operation are shown in the exhibits to Mr. Enochs' evidence, taken from actual transactions, showing by Exhibit 16 (R. V. II, 624) that in 1891-3, thirty-one cars of lumber traveled an average of 156 miles a day, loaded to 75 per cent. of capacity; while by his exhibit 15 (R., **Id.,** 622f; 536, 7), showing twenty-five cars performance to Niagara Falls, 1902-3, from Fernwood, Miss., there was an average daily travel on the Illinois Central of forty-nine miles; on the Erie, of forty-seven miles; on the Mich. Central, of 340 miles; with relative daily earnings, per car, per day, of Ill. Cen., $7.11; of Erie, $5.08; of Mich. Cen., $32.56.

Exhibit 14 to Mr. Enochs' evidence, (R., **Id., 622e,** 536) shows car performance of fifty-one cars, taken from actual transactions, in December, 1902-January, 1903, at the very period of this advance, whereby the loading was 86.08 per cent. of stenciled capacity, and the average travel each day per car was 22.2 miles.

The showing made by Exhibit 19 of car performance for March, 1903, from Eastman, Gardiner & Co., was equally as bad,

showing that cars had been in transit in some instances 122 days. This list embraced all their cars for the month of March, 1903, of which they had the data to show car performance (**Note.**—This paragraph is admitted to be true by stipulation, R. V. I, par. XIV, 428.)

This contention is answered by **Proposed Advance in Freight Rates, supra,** pp. 427-8, where it is said:

> "It appeared from the testimony that offerings of traffic are at present extremely large; that all lines are taxed to their utmost capacity, and that some have found it absolutely impossible to handle the amount presented. This is requiring enormous outlay in the providing of additional track facilities and the furnishing of additional equipment; and it was said that rates ought to be increased in view of this large increase in traffic, and the incident expenditures required.
>
> "The idea that increased traffic should raise rates is certainly a reversion of previous notions upon that subject. * * * Without doubt this increaced demand upon railways is requiring the expenditure of large amounts, but there is nothing in this which should justify an advance of rates so long as that expenditure will add proportionately to the earning capacity of the properties. * * * In its operation additional traffic can be handled more cheaply in proportion than traffic could be handled upon the tracks already existing. Clearly the fact that the volume of traffic is such as to require this outlay is not a reason why rates should be advanced, but rather why they should decline."

The contention that there has been a large advance in the price of lumber, and that, therefore, the rate should be advanced is answered in the same case, p. 401, where, as here, it was claimed: "The present prices of commodities are high, therefore they can pay a higher freight charge. Times are good and railroads should share in the general prosperity; but high prices of materials and labor add to the expense of operation, and gross revenues must therefore be increased." Says the Commission, "It is no longer a question of what the traffic will bear, but rather of what the public should bear."

In that same case, the Commission carefully considered the commercial conditions of the country, and the increase of cost

of materials, wages, etc., and on April 1, 1903, about the time for this advance to become operative, it held that there was no reason, from these sources, for permitting the advance of 2c per hundred on grain to be put into effect, and ordered that the carriers should desist.

This advance of 2c in the grain rate from the west seemed to be the companion act to this 2c advance on lumber from the South, and the same reasons exist for denying the advance in both cases, and the opinion of the Commission in that case, in every respect, sustains appellee's position.

Of the materials so much relied on as advanced in price, steel rails do not show any material advance. By Ex. 20 (R. V. II, 634) to Mr. Enochs' evidence compiled from Stat. Abst. U. S., 1902, it appears that the average price per ton for periods of five years was as follows: 1898-1903, $26.57; 1893-7, $24.61; 1888-92, $30.15; 1883-1887, $33.51.

So, too, with coal: Mr. Wallace testified there had been an advance of 10c per ton; and said Stat. Abst. for 1902, p. 462, shows that for the five-year period, 1893-8, the average price of coal was $2.55 per ton, and for 1898-2, the average was $2.22 per ton.

There has been no general advance in wages since June 30, 1902, on the Illinois Central, except the telegraphers, and hence the wage scale for 1902-3 would practically control.

This advance of 2c per hundred pounds was made by the joint action of all of the carriers south of the Ohio river; but it was allotted to the Illinois Central south of the Ohio river, to the Mobile & Ohio, to the Alabama Great Southern, to the Cin. N. O. & T. P., to the Southern, and the L. & N. R. Rds. The N. O. & N. E., Gulf & Ship Island, and the A. & V. Ry. Co., did not receive any of this advance though they joined in through tariffs exacting it. As this 2c per hundred is especially for the benefit of these roads and the divisions of these roads **south of the Ohio river,** it becomes pertinent, on the question of the reasonableness of this specific charge of advance of 2c in the rate for this specific south section, to inquire into the relative needs of these roads **north and south of the Ohio river.**

Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 to Mr. Enochs' evidence, compiled from the Stat. Railways of U. S., 1902, p. 374, and

the advance sheets of 1903 (R. V. II, 527) omitted from printed record, but stipulated into this record (R. V. I, par. XV, 428), show that the revenue of the Illinois Central (Chic., St. L. & N. O. R. R.), and of the L. & N., and of Mobile & Ohio, and of the Southern, south of the Ohio river, is relatively greater than it is north of the Ohio.

Said Ex. 1 shows (R. V. II, 528; 9, see Stats. Rys. U. S., 1901, pp. 366, 367, 368, 369, 372, 373, 374, 375 and **Id.,** 1902, pp. 374, 375, 376, 377, 380, 381, 382, 383):

ILLINOIS CENTRAL.

Year.	Group.	Passenger Earnings per Train Mile	Freight Earnings per Train Mile	Proportion to Total Earnings.	Total Earnings per Train Mile.	Proportion Total Earnings and Income
1902	5	.91546	1.76618	74.86	1.577	100.00
1902	6	.91245	1.68472	64.17	1.513	88.14
1901	5	.89465	1.38072	73.29	1.285	100.00
1901	6	.82632	1.51878	64.21	1.345	90.45
			SOUTHERN RAILWAY.			
1902	5	.87986	1.76677	69.56	1.460	97.34
1902	6	.64291	1.20079	69.24	1.088	100.00
1901	5	.87007	1.67460	69.06	1.423	98.37
1901	6	.59567	1.21564	70.52	1.097	100.00
			LOUISVILLE & NASHVILLE.			
1902	5	1.13271	1.70528	74.61	1.590	96.60
1902	6	1.15638	1.65890	64.94	1.494	99.03
1901	5	1.09771	1.71063	73.17	1.584	95.74
1901	6	1.08592	1.46858	66.73	1.363	100.00
			MOBILE & OHIO.			
1902	5	.83391	1.91076	82.72	1.579	87.25
1902	6	.82256	1.18959	82.25	1.109	100.00

It is to be noted that in 1902 the proportion of the freight earnings of the Illinois Central per train mile for the first time was greater in Group 5 than in Group 6.

It is shown by Exhibits 5 and 6 (Stat. Rys., 1902, p. 43) that the average wages of railway employes is less in Group 5 than in Group 6; and that those in Group 5 in 1902 were less than like average wages throughout the United States; and that like average wages in 1892 were comparatively greater than in 1902 in Group 5.

By said Ex. 7, it is shown that in the main a greater number of employes are allotted to each 100 miles of road in Group 6 than in Group 5. (Stat. Rys., 1902, p. 37, 8). By said Ex 8 it is shown that the equipment in Group 6 largely exceeds that of Group 5, in that Group 5 had 1751 freight locomotives, Group 6 had 4686 (**Id.,** p. 22). Group 5 had in freight service 102,188 cars; Group 6 had 321,130 cars (**Id.,** p. 21). The assignment per 1,000 miles of equipment shows to Group 5, 77 freight locomotives and 4500 freight cars; to Group 6, 103 freight locomotives and 7019 freight cars (**Id.,** p. 22.)

The assignment of equipment to amount of traffic shows:

Territory Group.	Tons Carried Per Freight Locomotive.	Ton Miles Per Freight Locomotive.	Freight Cars per 1,000 Tons of Freight Carried.
5	45,434	6,623,442	1,284
6	44,850	6,377,796	1,528

Thus, with less wages and with less equipment, the efficiency of operation is greater in Group 5 than in Group 6.

The empty car mileage in 1902, Ex. 9, (Stat. Rys., 1902, p. 70), was practically balanced north and south in Group 5, while in Group 6 the excess was south and west.

Lumber, with 88,-653,863 total freight tonnage in 1902, and 97,486,984 in 1903,'stood second in rank of all the commodities in the United States, and was exceeded only by bituminous coal. (See Oy. of Commission, R. V. II, 986, and wherein is compiled the relative tonnage of grain, fruit, coal, lumber, etc., during 1901-2-3)

In Groups 4 and 5 south of the Ohio and Potomac rivers, lumber furnished 18.65 per cent. of the agrregate of tonnage upon their lines. (Stat. Ry., 1902 p,. 69.)

The average of taxation is less in Group 5 than in Group 6. **Id.**, pp. 89, 94.

By Exhibit 2 to Enochs' evidence a compilation is made from said Statistics Railways 1899-1903 to show the relative gross earnings per mile of the Illinois Central in Group 5, **south**, and in Group 6, **north**, of the Ohio river, viz:

ILLINOIS CENTRAL.

Year.	Group.	Mileage.	Gross Earnings.	Gross Earnings Per Mile.	Excess Per Mile.
1903	5	p. 218	p. 379	$11,779.90	$1827.67
1903	6	p. 234	p. 385	9,952.33	
1902	5	p. 210	p. 375	10,566.70	1490.56
1902	6	p. 228	p. 381	9,070.54	
1901	5	p. 212	p. 367	9,718.70	530.01
1901	6	p. 228	p. 373	9,188.69	
1900	5	p. 198	p. 361	8,746.56	886.17
1900	6	p. 214	p. 367	7,860.39	
1899	5	p. 206	p. 369	8,086.56	
1899	6	p. 222	p. 377	8,817.56	719.00

Thus, from an excess of gross earnings in favor of Group 6 **in 1899** of $719, there has been an increasing increase in gross earnings per mile every year in favor of Group 5, until in 1903, it amounted to $1,827.67. The foregoing table shows that the increase of gross earnings **south** in the five years between 1899 and 1903 has been 45.45 per cent., while the increase **north** of the Ohio river has been only 10.28 per cent. Thus showing, not only that the greatest earnings have been and are south, but that the ratio of increase south largely exceeds that north of the Ohio river for the last five years.

Illinois Central shows (Stat. Rys., U. S., 1901-2-3, 638-9):

		Earnings from from Operations.	Miles Operated.		Per Mile Operated.
South—					
1902-3	p. 379	$16,193,850	1374.71	p. 218	$11,779.90

1901-2	p. 375	14,518.450	1374.71	p. 210	10,566.79
North—					
1902-3	p. 385	29,124,600	2926.39	p. 234	9,952.33
1901-2	p. 381	26,317,931	2909.19	p. 288	9,070.54

	Total Miles Operated.	Earnings South Per Mile.	Earnings Whole Line, on Basis South.
1902-3	4301	$11,779.90	$50,665,349.90
1901-2	4283.90	10,556.79	45,262,072.68

	Total Miles Operated.	Earnings North Per Mile.	Earnings Whole Line on Basis North.
1902-3	4301	$ 9,952.88	$42,807,336.88
1901-2	4283.90	9,070.54	37,857,986.30

Difference in favor of South side of river, 1902-3, $7.850,013.02.

Difference in favor of South side of river, 1901-2, $7,404,088.38 (R. V. II, 639).

This shows that, if the same basis for gross earnings was applied by the Illinois Central to its lines **north,** as is applied **south** of the Ohio river, its gross receipts would have been increased in 1901-2 by $7,404,088.38, and in 1902-3, by $7,858,013.02.

The Preliminary Report on Income Account of Railways, in U. S., 1903 (p. 38, 39, 44, 45) of this Commission for 1903 emphasizes this result, showing, p. 38, the **net earnings** of the Illinois Central **south** of the Ohio, with 1374.71 miles in 1902 were $5,023,320, and in 1903 were $5,569,609, an **increase** of $546,289; while **north** of the Ohio, with 2926.39 miles (p. 44, 5), the net earnings increased from $9,549,587 in 1902 to $9,780,584, in 1903, or only $250,997; thus, with less than one-half the number of miles, the south made an increase in net earnings of more than twice that of the north end.

The "statement of receipts, operation expenses, etc., of Main Line and Kosciusko Branch, Memphis Div., and Louisville Div. of the Chicago, St. Louis & New Orleans Railroad (Ill. Cen. R. R. Co. south of Ohio river)," Exhibit G to Mr. Bowes (R. V. II, 854), shows conclusively that the line south of the

Ohio river should not be permitted to make this advance. This statement shows that the gross receipts of the Chic., St. L. & N. O. R. R. in 1902 were $14,284,898.81, and in 1903, $15,948,-872.83; an **increase** of $1,663,974.02; also, that the operation expenses for 1902 were $9,257,568.58, and for 1903, $10,399,550.86; an increase of $1,141,982.38, leaving an **increasing increase** of gross earnings over operation expenses of $521,991.54. This would be 5.2 per cent. on the capital stock of $10,000,000.

Mr. Bowes (Defts. New Ev., R. V. I, 148) testifies: "Our earnings for 1905 were greater than they were for 1904, and our earnings for 1904 were greater than they were for 1903."

So, whatever may be claimed, the Illinois Central south of the Ohio river has not so increased operation expenses as to decrease its increasing net earnings.

The Exhibit (R. V. II, 638) made by Mr. Enochs, as to the Louisville & Nashville north and south of the Ohio, shows that the gross earnings per mile south of the Ohio exceeded those north in 1902, by $1,907.50, and in 1901 by $1,679.46. Mr. Compton (Defts. New Ev., V. I.181) testifies that the condition of theL. & N., as to both gross and net earnings has improved, saying: "I think it perfectly fair to state that our condition is better today" (1906) "than before."

When the enormous amounts of the improvement accounts of these several railroads during the last few years is considered, and which have been paid through operating expenses without charge, the claim of the railroad companies for more revenue because of the increased cost of transportation cannot be maintained.

The fact (R. V. II, 967) that the Mobile & Ohio voluntarily allows tap line divisions for logging the mills of from 3c to 3½c per hundred upon practically all of the lumber shipped to Central Traffic territory originating on its line is conclusive that the former rate of 14c was a reasonable compensation for the service rendered. Unlike the Illinois Central, which itself charges the full rounded arbitary of 2c per hundred bridge toll at Cairo, the traffic over the Mobile & Ohio has to pay bridge toll of $100,000 per annum to the Illinois Central, and so the Mobile & Ohio was

willing to render this service for 14c per hundred, less the tap line of from 3c to 3½c, or 11c to 10½c, and then pay bridge toll —thus netting much less than 14c for the service rendered. As this rate was thus reduced to 11c to 10½c by considerations outside of its duty as a carrier, it cannot claim now that this rate for the transportation service was not, as to the public, reasonable. The government, or its substitute by delegation, has no right to increase the burden of the public to compensate for expenditures disconnected with the public service. Railroad corporations may and should conduct their business by encouraging the development of enterprises along their lines. These enterprises return to their stockholders directly, in increased traffic, reciprocal benefits. The stockholders, and not the public, should pay such donations. The most vicious of all systems of indirectly imposing these burdens upon the public is to select a single commodity, as lumber, and make it alone, by tap line divisions, bear the burden of donations in the encouragement of local enterprises.

The answers of M. & O., to complainants interrogatories show that since 1897 the average freight car capacity had increased 119,320 tons, and the average engine capacity had increased 157,098 tons, thus showing a deficiency in increase of relation of motive power to equipment. This statment is admitted (Stipulation, par. II, V. I, 420).

They also show as follows (R. V.I,par. III, 421):

Year.	Freight Receipts.	Operating Expenses, including Salaries, Damages and Taxes.	Excess.
1901-2	$4,932,837.22	$4,489,186.15	$443,651.07
1902-3	5,686,856.83	5,211,171.53	475,685.30

This shows that relatively the operation expenses had not increased in proportion to the freight receipts. If the passenger receipts are included it would show a still greater increase. In answer to Int. 9 the M. & O. gives its gross earnings from 1893 and shows a steady increase from $3,253,691.17 to $7,486,980.39 in 1903, and its net earnings show a steady increase from $223,-769.19 in 1896-7 to $747,276.07 in 1903; and that there was applied of income to betterments in 1901, $417,467.90; in 1902,

$417,510.25; in 1903, $383,605.19; and to dividends, for the first time except a small one in 1897, in 1903, $107,412.00.

The annual report of 1903 to the stockholders of Mobile & Ohio Railroad (see Stipulation, par. III, **supra**) shows that in operation expenses for 1903 there was for maintenance of ways and structures expended $1,135,979.39, and in 1902, $871,854.99; and for maintenance of equipment, $955,070.76, in 1903; and in 1902, $726,071.79. On page 10 it appears that in these items of maintenance of way and structures, there was renewal of rails and cross ties and renewal of buildings, and that the renewal of cross ties increased in 1903 over 1902, 42.25 per cent.; the rail renewals of 1903 were 16,674 tons of new 75-lb. steel rails, or about 141 miles, with 9,422 tons of serviceable relaying rails; and during 1902-3, 216 miles of new 75-lb. rails had been put into the track, out of total mileage of 871 miles; stating also: "The passing tracks already completed have greatly improved the facilities for handling trains, but the demands of increased traffic will make further additions necessary in the immediate future." Said report states, p. 11, that the expenses of conducting transportation during the year 1902-3 increased 8.89 per cent.; more than half of which was the cost of fuel; that the general expenses increased 5.59 per cent. while the ton miles increased 18.1 per cent., and the passenger miles, 7.95 per cent. It gives (p. 9) as operating accounts, earnings and expenses, upon same number of miles, as follows:

Gross earnings, increase over 1902.....15.01 per cent.
Operating expenses and taxes, inc. over 1902....30.20 per cent.
Net earnings, increase over 1902.....12.64 per cent.

Ratio of expenses to earnings, 1903, 69.59 per cent.; 1902, 68.98 per cent.; increase, .61 per cent. (see Stip., par. IV, R. V. I, 422).

The balance of net income, after payment of interest, rentals and other charges against income, for 1903, was (p. 5) $412,625.95, or a net income of 7.6 per cent. on capital stock, p. 17, of $5,370,600.

The dividend paid was 2 per cent., leaving to credit of profit and loss, $305,213.95, an increase over 1902, of $181,163.71, **Id.** If the accounts had been kept properly and the betterments had been separated from operation expenses the net earnings would have been correspondingly larger.

The answers of the Cin., N. O. & Texas Pac. R. R. Co. to complainant's interrogatories (Stip., par. V, R. V. I, 422) illustrate appropriately the status of the increase of operation expenses by wages, fuel, etc., and their effect upon net earnings. This road is operated under a lease, and, therefore, these extraordinary expenditures for betterments are not charged into operation expenses, but only such as will keep it in good operative condition. The construction of this road is abnormally characterized by grades and curvatures, traversing the mountain ranges, with all of their con-comitant difficulties and expenses of operation. Notwithstanding these extra burdens its said answers show as follows:

Year.	Salary of Employes.	Betterments.	Other Operating Expenses.
1900-1	$1,508,649.75	$353,913.39	$1,571,884.72
1901-2	1,747,842.07	202,674.10	1,989,282.17
1902-3	2,186,752.14	401,958.66	1,754,452.14

The gross earnings and the net earnings, after paying the rent and maintenance, operation, etc., are as follows:

From a deficit in 1899-1900 to

Year.	Gross Earnings.	Net Earnings.	Surplus.
1900-1	$5,066,207.75	$1,320,501.85	$180,732.78
1901-2	5,686,253.61	1,446,659.81	207,780.51
1902-3	6,218,957.85	1,569,518.68	306,328.77

In 1902-03 there was a dividend of 5 per cent. paid on its preferred stock, the first dividend since prior to 1892.

It will be noted that operating expenses, other than wages, decreased in 1902-03 from $1,989,272.17 in 1901-02, to $1,754,452.-14; and that there was only a net increase of wages and other operating expenses in 1902-03 over 1901-02 of $204,180.04, while the increasing increase in the gross earnings was $532,704.24, and the increasing increase in net earnings was $122,858.77.

The Gulf & Ship Island's annual report of 1903 to its stockholders, states p. 5-6 (see Stip., par. VI, R. V. I, 423), "Throughout the fiscal year ended June 30, 1903, the great prosperity mentioned in the annual report of 1902 continued undiminished. Indeed by reason of the satisfactory industrial conditions prevailing in Southern Mississippi the gross earnings of the company increased 24 per cent. over those of the previous year."

The acreage of land in cultivation increased 25 per cent., and as the land is cleared it is being planted with cotton, corn, sugar cane and fruit.

The development of agriculture and industries is "extremely gratifying." "The last few years have demonstrated beyond peradventure that the traffic which arises on the cleared and developed portions of the road is equal in value to that derived from the transportation of timber, if not greater. It can be said with certainty that when the timber is exhausted, farms, manufactories and other industries will have taken its place and our business will be materially increased."

The evidence of Mr. J. J. White, who has been familiar with the Southern Mississippi lands for many years, shows that the lands along the Gulf & Ship Island are like those along the Illinois Central in the McComb City belt, and that after the timber is cut off the lands are valuable as farming lands.

The harbor at Gulfport, upon which the Gulf & Ship Island lays such stress, and properly so, will yield export facilities incomparably superior to New Orleans or Mobile and it promises to be the highway to the prospective Panama Canal.

The contractual divisions of the Gulf & Ship Island on lumber with the Illinois Central is 7c, and to points south and west of the Missouri is 50 per cent.

Its divisions with the Illinois Central, via Jackson, on lumber from Kingston and Laurel on its line to the following points, under Ill. Cen., Sup. 10, to Division Sheet A, 1416. Ex. to Mr. Gardiner's evidence, are as follows (see Stip., par. XVI, R. V. I, pp. 428-9):

To—	G.& S.I.	Ill. Cen.	Beyond	Total.
Bessemer, Ala.	3½	3½	3	10c
Birmingham, Ala.	3½	3½	3	10c
Chattanooga, Tenn.	3¼	3¼	5½	12c
Emory Gap, Tenn.	3¼	3¼	10½	17c
Ensley, Ala.	3½	3½	3	10c
Gate City, Ala.	2¾	2¾	4½	10c
Memphis, Tenn.	5½	5½		11c
New Orleans, La.	3	3		6c

The divisions as per Exhibit (R. V. II, 942) filed by Mr. Hayden Miller on lumber delivered to the Mobile & Ohio at Meridian, by N. O. & N. E., for Cairo and beyond, are as follows: Gulf & Ship Island to Hattiesburg, Miss., 6c, plus New Orleans & N. E., 3c, equals to Meridian, 9c; thence by Mobile & Ohio, to Cairo, 7c; total, 16c (see Stip. V. I, par. XVII, 429).

The divisions on lumber originating on Mobile, Jackson & Kansas City R. R., by Gulf & Ship Island, and Ill. Cen., to Cairo, are as follows (R. V. II, 95): To Mobile, J. & K. C., 5c; to G. & S. I., 3c, equals to Jackson, 8c; from Jackson, Miss., by Ill. Cen., to Cairo, 8c; total, 16c.

The Gulf & Ship Island takes lumber from the Mobile Jackson & K. C. R. R., at Hattiesburg, and hauls it to Jackson for 3c, while the contract price with the Ill. Cen. for lumber on its own line at Hattiesburg yields 7c. If, for the same service the Gulf & Ship Island charges only 3c, it is difficult to reconcile with reasonableness a charge of 7c.

The lumber tonnage of the Gulf & Ship Island for 1902 was 735,712 tons out of a total tonnage of 825,892 tons; and for 1903, 841,686 tons, out of a total tonnage of 962,213 tons (see Stip., par. XVIII, R. V. I, 429). Thus these extraordinary divisions are imposed upon 79.63 per cent. of its total tonnage in 1903.

The report of the Gulf & Ship Island Railroad for 1903, p. 16, recites (see Stip., par VI, R. V. I, 423-4): "Transportation Results.—The work of the transportation department shows extremely satisfactory results. While the number of revenue tons of freight carried one mile increased 23.67 per cent., as compared with 1902, the revenue freight train mileage decreased 1.97 per cent. The average revenue freight train load increased from 164.18 tons to 207.11 tons, and the average loaded revenue freight car load rose from 14.18 tons to 15.91 tons. The average number of cars per train advanced from 16.59 in 1902, to 18.38 in 1903. Freight earnings, per freight train mile, averaged $3.91 in 1903, as against $3.13 the previous year; and passenger train earnings, per train mile, averaged $1.01 as compared with 84c the year before."

The table, p. 17, Freight Service, of said report for 1903 shows (see Stip., par. VI, R. V. I, 423-4):

Total earnings from freight increase over 1902, 22.65 per cent.

No. of revenue tons carried one mile, over 1902, 23.67 per cent.
Revenue freight train mileage decrease over 1902, 1.97 per cent.
Average freight train load increase over 1902, 26.15 per cent.
Freight earnings per revenue freight train mile increase, over 1902 24.92 per cent.

It is manifest that there is no justification for the Gulf & Ship Island demanding this advance, even for its neighbors.

The Alabama & Vicksburg does not receive any of this advance. The evidence shows that it was never in its history as prosperous as in 1902-03, and it actually declared two dividends during the year, the regular dividend of 6 per cent. and an extraordinary one of 3 per cent. (R. V. II, 436).

The fact that the New Orleans & Northeastern was content with what it received under the old rate of 14c, and neither claimed nor received any part of this advance, shows that it was satisfied with its compensation for the service rendered.

The Southern Railway Reports (see Stip., par. VII, R. V. I, 424-5) show that its average freight haul, per train, increased from 1896 to 1903, 62.09 tons; of which, in 1903, 13.72 per cent., and in 1896, 12 per cent., was company material; an increase of 9.19 per cent. over 1896, when it was 10.81 per cent. Its revenue freight increased per train from 144.43 tons in 1896 to 195.31 tons in 1902, or 34 per cent. Its company material freight per train increased from 17 tons in 1896 to 30 tons in 1902, or 76 per cent.; thus indicating extensive reconstruction. In 1903 its average receipts, per freight train mile, are shown to have increased from $1,445 in 1895, to $1,819 in 1902. Said Report (see Stip., par. XIX, R. V. I, 429-30) of 1902 shows that its revenue ton movement had increased 151.83 per cent. since 1895; and that it then had 397 freight locomotives; and in 1902, 598 freight locomotives; an increase of 50.6 per cent.; and that it operated, in 1895, 4391.94 miles, and in 1902, 6,765.9 miles; an increase of 2,373.96 miles; that its engine performance in 1902 was 20,398 miles, that of 1895, 17,048 miles, or an increase in engine mileage performance (or increased efficiency) of 19.65 per cent.; that the average number of tons hauled one mile by

each engine increased from 1895 to 1902, 61.80 per cent.; and that, based upon its engine performance in 1895, there was an increase of engine performance in 1902 of 19.65 per cent., while the increase in traffic was 151.83 per cent.

This shows that the motive power did not increase in the ratio of increase of traffic, and, therefore, the results of 1902 were brought about, and whereof its annual report of 1903 (R. V. II, 59) says:

> "While the increase in gross earnings is large, it could have been exceeded, if equipment, yard, and shop facilities had been equal to the demands upon them, and the net results could have been much improved if the transportation had been done under normal instead of congested conditions. It is confidently believed that with the improvements now in progress much better operation results will be obtained."

In its report of 1895 (see Stip., par. XIX, R. V. I, 429-30), it is said:

> "The equipment of the several lines of railways acquired by the company was inadequate in amount and much of it unsuitable in character and conditions, even for the traffic of the past year of great depression, and contracts were, therefore, promptly made for additional and more modern equipment in order to reduce operating expenses and provide in time for an increase in the volume of traffic and to secure the benefit of the low prices prevailing during the past year."

The Southern Railway was devised as a scheme of evolution, both operative and financial, in which the public, through excessive tolls, is to pay whatever may be required to develop its poverty-stricken properties into a first-class system of railroad property, and thereby to make of value its $120,000,000 of capital stock, and which, in answer to complainants' interrogatories, was said to be **for the purposes of organization.** The legal requirements of its charter were that the stockholders should furnish the money to pay for the property for the use of the public; its practice is for the public to furnish the money to pay for its property for the use of its stockholders.

Its condition and status was developed in the **Proposed Advance in Freight Rate** case, and needs no repetition. Its road traverses mountains, in an east and west line, and generally is, as to operation and equipment, inferior to the Illinois Central.

II.

AS A FINANCIAL PROBLEM.

Is this advance of 2c necessary so that each of the participating railroads may "earn a fair return upon that which it employs for the public convenience?"

> "The value of a railroad depends upon what it can earn on the basis of a reasonable rate; and the reasonableness of a rate depends upon the return which it will yield upon the value of the property." **Proposed Advance in Freight Rates,** 9 I. C. C. R., p. 405.
>
> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are actually worth." **Smyth v. Ames,** 169 U. S., 434.

What is a fair return upon the value of the property? In **Stanislaus County v. San Joaquin,** etc., **Co.,** 192 U. S., (1904), 201, the Court, in fixing the rates a water company should be allowed to charge, held that a dividend of 6 per cent. on the actual present value of the property used for the public was a "just and fair compensation for the use of the property by the public." The Commission in **Proposed Advance in Freight Rates, supra,** 411-2, indicates that about 4 per cent. upon the capital stock of the Michigan Central was a fair return.

In **Grain Shippers Assn. v. Ill. Cen. R. R. Co.,** 8 I. C. C. R., 158, the financial status of the Iowa lines were considered; and, in 1898, when there had been a dividend of 3 per cent. paid, and $86,000 carried to surplus, a reduction in the rate of 2c on grain, the principal commodity of that section, was ordered; and this upon the basis that the carrier had earned "4 per cent. upon more than enough to reproduce the property itself; and that in the year 1898, with its returning prosperity, it had paid extravagant rates of interest upon its funded debt, and a dividend of 3 per cent. upon its entire capital stock."

In **San Diego Land Co. v. National City,** 174 U. S., 734, it is said:

> "It cannot therefore be admitted that a railroad corporation maintaining a highway under authority of the State may fix its rates with a view solely to its own interests,

and ignore the rights of the public. But the rights of the public would be ignored if the rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered in determining the rates that may be reasonably charged" —169 U. S., 544.

The Commission and the Circuit Court found the claim of the railroads to greater revenue not well taken. The evidence of the railroad officers, taken during the hearing before the Commission, took a gloomy view of the future earnings of the railroad companies. This failed to materialize, and the defendant companies continued to prosper, as the evidence taken both before and since that hearing has clearly shown.

Let us consider the financial status of these railroad companies under these principles.

Illinois Central.

The Illinois Central from Chicago to Cairo, 707 miles, was created by subscription to the capital stock of $15,000,000 and was the recipient of a land grant from the United States of 2,595,000 acres of "the rich, rolling prairie lands of Illinois with black soil extending in depth five feet, a large part of the land underlaid with coal," and from this land the original subscribers to stock were paid back their original stock and in addition a large profit (R. V. II, 64).

In 1881-82 its capital stock had been increased to $29,000,000. In 1887 its capital stock was increased $1,000,000, and this was

sold to its stockholders at a premium of 136 (R. V. II, 466). The following increases of capital stock were made in the following years, and while the stock could have been sold at the following premiums, and thereby the issue of the stock reduced correspondingly, the stock was issued to its stockholders at par, and thereby the issues, as to the public, and as a basis upon which to earn rates, were excessive and cannot be treated as the fair value of the property Ex. to Mr. Robinson's evidence shows (R. V. II, 60, 1, 2, 3, 4, 688):

Year.	Increase.	Market Price.	Issue Necessary If Sold.	Excess Over What was Necessary.
1899-00	$ 7,500,000	120	$6,250,000	$1,250,000
1901	6,000,000	140	4,285,000	1,715,000
1901-02	13,200,000	140	9,428,500	3,771,500
1902-03	15,840,000	140	11,314,000	4,526,000

Total excess unnecessarily issued.....$11,262,500

Prejudicial effect has been given, against the public, by this unnecessary increase thus:

Capital stock 1903 (Statis. Rys., 1903, p. 348).....	$95,040,000
Excess of capital stock issued.....	11,262,500
Net capital as to the public.....	$83,777,500
Dividend paid 1903, 6 per cent. (Stat. Rys, 1903, 580)	5,702,400
6 per cent. dividend on $83,777,500.....	5,026,650
Excess paid in dividend as to public.....	$ 675,750

Capital stock 1902 (6% Div. Stat. Rys., 1902, 344-576)	$79,200,000
Excess issued.....	6,736,500
Dividend paid 6 per cent. 1902, on excess.....	404,190
Capital stock 1901 (6% Div. Stat. Rys., 1901, 338, 567).....	$66,000,000
Excess issued.....	2,965,000
Dividend on excess.....	177,900
Capital stock 1900 (5½% Div. Stat. Rys., 1900, 330, 565).....	$60,000,000

Excess issued	1,250,000
Dividend on excess	68,750
Total excess of dividends paid in four years,	$1,326,590
Total excess capital stock issued	11,262,500
Total excess	$12,589,090

Mr. Wallace defends this excess on the ground of the fear of prejudice to the stock market. This defense is its own accusation. See also R. V. II, 454, where Mr. Fish tells of bolstering the Chic., St. L. & N. O., stock at 80 cents.

If, however, this position is unsound the Illinois Central shows that it is not in need of additional revenue. The basic pretense is that there was during 1902-03 "a decreasing increase of net revenue," and, therefore, that the rates should be increased, so that every year there may be an "**increasing increase**" in net income. If so, where is the limit? If the **increasing increase** is continued for a sufficient length of time it would absorb the substance of the whole country. Fortunately this contention is answered by the Commission in **Proposed Advance in Freight Rates, supra,** p. 436, where it is said:"It is often said that the reasonableness of a freight rate must be left largely to the judgment of the traffic officials. This necessarily is so where the question is presented in its transportation aspect; it cannot be true where, as in the case before us, the question is whether the carrier has the right to advance its tariffs for the sole reason of increasing its revenues."

Exhibit 3 to Mr. Fish's evidence (R. V. II, 812) shows that since 1883 there have been dividends declared of from 10.54 per cent. to 5 per cent. except in 1889, when only 3 per cent. was declared. It shows that from 1898 to 1903 there was paid for "permanent improvements and other expenditures paid from income," after fixed charges and operation expenses had been paid, the enormous sum in the last six years of $18,639,321, and leaving for dividends, $23,225,652. Total net earnings, or surplus for dividends, if permanent improvements and other like expenditures had not been paid from income, in six years $41,864,973, or an average per annum of $7,144,162.

Its annual report to the stockholders of 1903 shows (see Stip., per. XXVI, R. V. I, 433):

Net income from operation	$10,729,393.13
Surplus dividend fund, 1901-02	1,132,446.92
Net income available for dividends	$11,861,840.05

Disposed of as follows:

Annual dividend 6 per cent.		$ 5,702,400.00
Sinking fund set apart to provide for bonds	$ 100,000	
Set aside for betterments	4,881,253.13	4,981,253.13
Surplus		1,178,186.92
Total		$11,861,840.05

Thus, after paying 6 per cent. dividend on its capital stock $95,040,000, it had earned during the year for disposition to permanent improvements, insurance fund and surplus fund, the enormous sum of $5,046,993, as follows (see Stip., par. VIII, R. V. I, 426):

Added to insurance fund	$ 120,000.00
Permanent improvements and betterments	4,881,253.00
Increase surplus	45,740.00
	$5,046,993.00

(See Stip., par. VIII; XXVI, R. V. I, 426.)

This would be 5.29 per cent. on $95,040,000, or, with the 6 per cent. dividend, 11.29 per cent., shown on the face of this report of 1903.

When the fact is considered that there was over 13.98 per cent. of company material transported without charge (see Stip., par. XX, R. V. I, 431), thus swelling the operation expenses for permanent improvements, it is difficult to calculate how much money this company has unreasonably exacted from the public in that year. There was in addition to a 6 per cent. dividend in 1902 as shown by said Ex. 3, to Mr. Fish's evidence (R. V. II, 812), earned and applied to betterments, $4,994,502, about $113,249 more than in 1903 (Stat. Rys., 1903, p. 541; **Id.**, 1902, Cols. 16, 17, p. 537); and, as stated, in addition to paying dividends

of 5 per cent. in 1898 and in 1899, and 5½ in 1900, and of 6 per cent. in 1901, 1902 and 1903, there has been exacted in 1900, 4.02 per cent.; in 1901; 4.78 per cent. in 1902, 6.30 per cent.; and in 1903, 5.24 per cent. of its capital stock (see Stip., par. XXXI, R. V. I, 438), for additions to the permanent improvement of its property, and which should have been paid by its stockholders, and there should not have been filched from the public as a contribution to capital this unnecessary sum of $18,639,321.

It was shown by the official returns that the net earnings for the five months ending Nov. 30, 1903, had increased over the same period of the preceding year by about $144,498 (R. V. II, 810). To rebut this Mr. Fish testified that this had been wiped out by the December showing. If that was correct, (as subsequent developments show it was not), it appears that in July and August, 1902, and January, 1903, there were comparative decreases with the same months of the previous year of $235,394, $283,816, and $117,680, and, yet, for the whole year there was a net increase. The varying monthly exigencies of weather, collections, betterments, etc., cannot control but the average of the year should be taken.

Mr. Robinson shows (R. V. II, 60, 1) that its net earnings on its capital stock in 1901 was 10.56 per cent.; in 1902, 12.36 per cent.; in 1903, 11.29 per cent.; and that its net earnings increased in 1901 over 1900, 13.51 per cent.; in 1902 over 1901, 20.6 per cent.; and in 1903 over 1902, 3.61 per cent.; or a total increase in net earnings for the three years of 37.72 per cent.; or an average annual increase of 12.57 per cent. When the increase was only 3.61 per cent. in 1903 over 1902, unmindful of the fact that it had been 20.6 per cent. in 1902 over 1901, and of 13.51 in 1901 over 1900, the unreasoning cry of an increasing decrease is made the predicate to exact this additional $1,000,000 per annum from these lumbermen.

CHICAGO, ST. LOUIS AND NEW ORLEANS.

(Illinois Central south of Ohio river, and to which this advance of 2c is allotted.)

This railroad is a separate, corporate entity from the Ill. Cen., and is leased to the Ill. Cen. (R. V. II, 823) for 400 years from 1882, and by an additional lease, as to Mississippi and Tennessee branch, or Memphis Division, from Grenada to Memphis, in 1889 (R. V. II, 832). These leases in evidence show that the autonomy of the Chic., St. L. & N. O. R. R. Co. was preserved, its officers and offices maintained, and that the Illinois Central, as lessee, was to maintain the property in as good order as when received, at its own expense; was to receive all of its assets; was to pay the taxes on the leased property; was to pay an annual 4 per cent. dividend upon $10,000,000 of capital stock as rent (R. V. II, 827), and was to pay off the principal and interest of (R. V. II, 825, 6):

1. 1st Mortgage bonds of N. O. J. & G. N. R. R., of 1856,	$2,847,000
2. 2d Mortgage bonds of N. O. J. & G. N. R. R., of 1860	1,483,000
3. 1st Mortgage bonds of Miss. Cen. R. R., of 1854	335,000
4. 2d Mortgage bonds of Miss. Cen. R. R., of 1865	1,319,500
5. 1st Mortgage bonds of Chic., St. L. & N. O. R. R., of 1877	1,400,000
6. 2d Mortgage bonds of Chic., St. L. & N. O. R. R., of 1877	180,000
7. Memphis Division Mortgage Bonds of Chic., St. L. & N. O. R. R., of 1877	3,500,000
(R. V. II, 834.)	
Total face of	$11,064,500

When the Illinois Central should take up the $7,564,500 of bonds, being all of them except the $3,500,000 on the Memphis Division, it was to receive in lieu thereof an equal amount of the issue of $18,000,000 bonds of 1881 of the Chicago, St. L. & N. O. R. R. Co. (R. V. II, 826).

The lease provides that the Illinois Central shall receive the certificates of the capital stock of $10,000,000, and issue therefor its leased line certificates of stock for $10,000,000, and as long as the dividend of 4 per cent. was paid on the certificates of capital stock they were to remain with and to be voted by the Illinois Central (R. V. II, 827-8), and for that any further advance of money made by the Illinois Central to Chic., St. L. & N. O. R. R., with 5 per cent. interest thereon, the Illinois Central was to retain possession of the leased property as mortgagee

in possession until paid. (R. V. II, 829.) The provisions of this lease have been executed.

The annual report of the Illinois Central of 1903 to stockholders in general balance sheet shows as liabilities of Illinois Central (see Stip., par. IX, R. V. I, 426):

Leased line stock $10,000,000
Funded debt, Chic., St. L. & N. O. R. R. 16,234,000

and these are all of the liabilities of the Illinois Central for the Chic., St. L. & N. O. R. R. Co., shown in said balance sheet of the Ill. Cen. R. R. Company.

The history of the Chic., St. L. & N. O. R. R., as given by Mr. Fish's prepared statement read in evidence by him, and by his evidence in connection therewith, is that (R. V. II, 451), "the plan of re-organization effected in 1877 contemplated a present fixed charge of $991,602.00, and a charge after 1882, of $1,453,002; this on an absolutely broken down railroad, bankrupt in credit, and bankrupt physically, unsafe for travel and destitute of equipment, the extreme length of which, including a worthless branch, did not exceed 567 miles. That is to say, that the immediate interest charge was at the rate of $1,748.85 per mile, and from 1882 onward it was to be $2,562.61 per mile."

Thus, the public and not the stockholders of the re-organized corporation was to furnish the capital to create anew this bankrupt corporation.

Mr. Fish further admits (R. V. II, 458) as recited in Poor's Manual, that the Ill. Cen. first made a contract with the N. O. J. & G. N. R. R. Co., and the Miss. Central (then the Southern R. R. Assn.) whereby it was to devote a part of the earnings from the traffic received from these roads as a guaranty fund for their extension bonds. This proved ineffective; and so, afterwards, the Illinois Central agreed to guarantee or to take a certain amount of mortgage bonds of both companies to make the extension from Jackson, Tenn., north to Cairo, a distance of 106 miles. The Illinois Central became the owner of $5,000,000 of these bonds issued in 1872 for this extension. Default was made in natural and foreordained course, under this progression of absorption by Illinois Central, in the payment of these extension bonds; and the mortgages were foreclosed in 1877, and

there was found to be outstanding $3,963,236.06 of N. O. J. & G. N. R. R. extension bonds of 1872; annd the N. O. J. & G. N. R. R. was sold, at public sale, under the decree, for $1,050,000. In the foreclosure of the 1872 bonds of the Mississippi Central there was found to be outstanding $4,420,374.40, and the road was sold, at public sale, under the decree, for $425,000.00. The Illinois Central owned about two-thirds of these extension bonds, and there was an unsatisfied deficiency of $6,908,610.46 of extension bonds after the application of the proceeds of foreclosure sale. These foreclosures were subject to the underlying bonds which, as shown, **supra,** in the lease of 1882 were:

1st mortgage N. O. J. & G. N. R. R. bonds of 1856	$2,847,000
2nd mortgage N. O. J. & G. N. R. R. bonds of 1860	1,483,000
1st mortgage Miss. Central R. R. bonds of 1854	335,000
2nd mortgage Miss. Central R. R. bonds of 1865	1,319,500
Total	$5,984,500

The purchasers under foreclosure sale in 1877 (R.V. II, 450) being these extension bondholders, the Illinois Central and its directors, by agreement of Nov. 7, 1877, organized the Chic., St. L. & N. O. R. R., with capitalization:

Capital stock		$10,000,000
1st mortgage 7 per cent. bonds	$13,000,000	
2nd mortgage 6 per cent. bonds	8,000,000	21,000,000
Total		$31,000,000

There was nothing paid in on this capital stock of $10,000,000 except the railroad property purchased, and it was burdened with $21,000,000 mortgage bond debts. (R. V. II, 450.) From 1878 to 1881, Mr. Fish states, "the road was rebuilt from end to end, the guage changed to conform with what is now the universal standard in the United States, and every car and engine rebuilt, new cars and engines bought, shops built and rebuilt, every bridge rebuilt, every bar of iron replaced with steel rails, grades reduced, line lengthened at great expense to come up squarely to Cairo, road ballasted in large part," etc. (**Id.**, 450.)

Thus, this entire reconstruction of this physically bankrupt road. destitute of equipment, etc., was not paid for by this $10,000,000 of stock. The holders of this $10,000,000 of stock, according to Mr. Fish, furnished the corpse, the public paid for its resurrection.

In 1881, the Chic., St. L. & N. O. R. R. Company made a new mortgage of $18,000,000 (not $21,000,000) bearing 5 per cent. interest (R. V. II, 450). All of the 6 per cent. and 7 per cent. bonds owned by the I. C. R. R. Company and by officers, directors and friends of that company, were converted into bonds of this $18,000,000 issue, and all of the 6 per cent. bonds except $80,000 were converted into them. "It was this great reduction in interest, this dedication of the earnings to betterments and the connection with the I. C. R. R., a prosperous and growing concern, which, with the growth of the country, gave value to the stock." (First R. V. II, 450.)

The claim was made by Mr. Fish that the amount of the deficiency of the bonds of 1872, unpaid by the proceeds of the foreclosure sale of the road in 1877, was a valuable consideration for the issue of the $10,000,000 of stock to the reorganizers. As all the property of these bankrupt corporations was sold, the railroads themselves bankrupt, physically, and destitute of equipment, and actually wholly reconstructed from 1878-1881, according to Mr. Fish, it would seem that a deficiency on a mortgage debt, with about $6,000,000 underlying bonds, would hardly pass for a payment of value for the stock.

Under these circumstances the lease of 1882 was made, whereby, on this $10,000,000 of stock, the Illinois Central agreed to pay, after paying taxes, cost of maintenance of track and equipment, etc., a fixed annual dividend of 4 per cent., and to take up the outstanding bond issues thereon, as stated in said leases, of $11,064,500, and to receive for $7,564,500 thereof an equal amount of said $18,000,000 bond issue.

The Illinois Central made a stock dividend of this Chic., St. L. & N. O. R. R. Co. stock to its stockholders of 17 per cent., (R. V. II, 455), so that the stockholders of the Illinois Central, or their assigns, receive the 4 per cent. dividend on this stock; and, also, the 6 per cent. dividend upon the Illinois Central stock, as stockholders of the Illinois Central, and as earnings of the Illinois Central.

As a financial proposition the Illinois Central thus charges the public with the payment of all of the interest on the bonds which re-created the road; and then, after paying operating expenses and taxes, requires it to pay 4 per cent. dividend on this $10,000,000 of stock; and then, in addition, to pay, in part, the dividends on the $95,040,000 of Illinois Central R. R. stock proper, its interest, etc. This, in itself, is unreasonable. In practical operation it is made more unreasonable.

The Preliminary Report on Income Account, 1903, in U. S., pp. 38, 39, 44, 45, and R. V. II, 532, show that the net earnings of the Chicago, St. L. & N. O. Railroad (Ill. Cen. Railroad south of the Ohio river), for 1903 were $5,569,609; an increase over 1902 ($5,023,320) of $661,489.

The net earnings of 1903, $5,569,609, divided by 1,374 miles (number of miles south of Cairo) equals $4,148 net earnings per mile. The net earnings of 1903 of Illinois Central north of Ohio river were $9,780,584, which divided by 2,926 miles (number of miles north of the Ohio river) equals $3,349 of net earnings per mile; or, an increase of net earnings per mile south over those north in 1903 of $779.

The statement filed in evidence of Chic., St. L. & N. O.R. R., (Ex. G to Mr. Bowes' Ev., R. V. II, 854) showing receipts operating expenses, etc., shows:

	1902.	1903.
Gross receipts (over charges deducted)	$14,284,898.81	$15,948,872.83
Operating expenses	9,257,568.58	10,399,550.86
Net income from operation	5,027,330.23	5,549,321.97
An increase over 1902 net income of		$521,991.74
Interest on funded debt and leased line certificates	$ 2,352,662.68	$2,364,613.17
Rentals of leased lines	60,588.09	52,039.70
Taxes	443,655.97	444,255.82
Surplus	$ 2,170,423.49	$2,688,413.28
Miles of road operated	1,263.28	1,278.98

Amount expended in permanent improvements charged to construction acct	$1,647,785.95	$3,503,660.28
Overcharges	660,804.85	740,054.35
*Funded debt per mile road	37,166.86	36,782.63
*Capital stock per mile road	8,046.86	7,946.47
*Total capitalization per mile	45,213.72	44,729.10
*Princeton to Gracey, 20.56 miles, not included.		
Interest charge per mile of road including the dividend on lease line stock 4 per cent. on $10,000,000		$1,766.26

This statement shows that after paying all of the operation expenses, and deducting overcharges (whatever that may be) of $740,054.45, the **net income**, in 1903, was $5,549,321.97. It is to be noted that $3,503,660.28 in 1903 was expended in **permanent improvements.** and was charged to construction account, and this amount was manifestly charged to operation expenses in arriving at the "surplus" of $2,688,413.28 of 1903. If this $3,503,660.28 was charged to operation expenses it should be charged back, and placed in net income, and this would increase net income of 1903 to $9,052,982.25. If this is not done, however, and the net income is left, as stated, $5,549,321.97, after paying all interest, and 4 per cent. dividend on $10,000,000 of stock, $2,364,613.17; and rental of leased lines, $52,039.70; and taxes $444,255.82, there is left a **surplus of net income** for the year 1903 from operation of $2,688,413.28; or, per mile of road, 1,278.98 miles, of $2,136.72; an excess over the interest charges and 4 per cent. dividend per mile of road of $1,766.26, of per mile, $470.46. The dividend, thus earned, on $10,000,000 stock would be 4 per cent., plus $10,000,000 divided by $2,688,413.28, and equals 26 per cent.; or, a net profit, in 1903, on $10,000,000 stock of 30 per cent.

This $2,688,413.28 "surplus" of 1903, is 2.8 per cent. on the $95,040,000 of capital stock of the Illinois Central; and, thus, besides paying a dividend of 4 per cent. on its own capital stock, and earning 2.8 per cent. dividend on the whole capital stock of the Illinois Central, this road expended $3,503,660.21 in permanent improvements in 1903. As the Illinois Central made a

stock dividend of the stock of Chic., St. L. & N. O. R. R. (R. V. II, 455), these earnings of Chic., St. L. & N. O. R. R. are the assets of the Illinois Central for its own stockholders.

The foregoing table showing the statement of receipts, operation expenses, net income, payments therefrom, and surplus for 1902 and 1903, was filed in evidence before the Commission and is found in R., V. II. 854, and it is treated, **supra.**

This statement filed in evidence before the Commission for 1902 and 1903 has been brought down since that hearing through 1904 and 1905, and it shows a continued improvement, both as to gross earnings, net earnings and surplus. (Dfts. New Ev., R. V. II, 237.) In the statements, its net earnings in 1905, $5,700,635.27, exceeded those of 1903, $5,549,321.97, by $151,313.30. From the net earnings of this road there is paid (see Stip., par. XXXVII, R. V. I, 442-3): (1) Interest on the funded debt; (2) 4 per cent. dividend on the $10,000,000 of stock, declared out as a dividend of 17 per cent. to Illinois Central stockholders; (3) rentals of leased lines; (4) taxes. And the balance, amounting in 1902 to $2,170,243.49, and in 1903 to $2,688,413.28, and in 1904 and 1905 to approximately the same amounts, is put in the treasury of the Illinois Central under the title of "Surplus." This "Surplus" (**Id.,** XXXVIII) differs from ordinary "surplus," in that it arises out of and is confined to each year's transactions—it is the net profits of each year. But from these statements rendered, there is no disposition made of it; nor is this surplus of one year carried forward into the next year's accounts as is done in the Illinois Central's regular report. This Chic., St. L. & N. O. R. R. has a separate bookkeeper from the Illinois Central (R. V. II, 440) and he knows nothing of the relations between his books and those of the Illinois Central (R. V. II, 444-5).

Under the lease to Illinois Central for 400 years (R. V. II, 829), sec. 5, the property of the Chic., St. L. & N. O. R. R. is to be retained by the Illinois Central, as lessee, after the lease expires for a term sufficient to reimburse it for the cost, with 5 per cent. interest, of any improvements made beyond the calls of the lease, if this sum is not paid by the Chic., St. L. & N. O.

R. R. Company. The money expended in construction and improvement by the Illinois Central R. R. Co., as lessee, is thus made an obligation of the Chic., St. L. & N. O. R. R. Co., and it is in no sense a betterment paid for by the Illinois Central on its own account, or on account of its own property. Thus., when the Illinois Central states that it has expended so many millions in permanent improvements out of the earnings of the Chic., St. L. & N. O. R. R. Co., and charged them to "construction account," it is but another form of stating that the Chic., St. L. & N. O. R. R. Co. is making these improvements for the benefit of Illinois Central, as lessee, and is to pay therefor.

To show the financial evolution of Chic., St. L. & N. O. R. R., Mr. Andrews, counsel, filed a statement of "net income or deficit," (the "surplus" of the statement, R. V. II, 854; Defts. New Ev., V. I, 237), for the years from 1891 to 1905 (see Stip. Rys., XL VII, R. V. I, 45 7-8), and that statement shows that up to and during 1894 there was each year a deficit in net income. That the net income of the year ending 1894 showed a deficit of $155,229.71; and that for the fiscal year ending June 30, 1895, this deficit was changed into a profit of $299,967.64, and continued to be a profit even during 1898 and 1899 (yellow fever years), and in 1903, this profit was $2,696,421.24 (see Stip., par. XLVII, R. V. I, 457-8).

It was in 1894 that the adjustment of yellow pine lumber rates of the railroads east and west of the Mississippi river was made, whereby the rate on the east side was reduced to 13c, the rate on the west side. From that time the "net income" of Chic., St. L. & N. O. R. R. Co. became a **profit** instead of a **deficit**, increasing yearly on an average. Thus, under the 13c rate, whereby lumber from the mills east of the Mississippi river could compete with those west of the river north of the Ohio river, the deficit becomes a "net income," or profit. This continues throughout to the present time. The effect of the advance to 14c in September, 1899, is clearly marked in this statement, whereby the net income of 1899 of $106,434, increased in 1900 to $892,903; in 1901, to $1,482,891; in 1902, to $2,149,425; in 1903, to $2,696,421; and, by continuing increases, in 1904 and 1905. Thus, according to those exhibits the "sur-

plus"—that is, the net profit after all expenses, interest, dividends, taxes and rents are paid—amounts to this enormous sum each year.

It was contended by counsel below that "betterments" and "improvements" should be charged to "operating expenses," and that this Court had sustained that rule, citing upon argument **Un. Pac. Ry. Co. v. U. S.,** 99 U. S., 402, 420. That case will be found not to involve the principle applicable to the present case. There, the United States had advanced money to the railroad company, and was to be paid 5 per cent. of the net earnings: and the question was, in a contest between the stockholders and the United States—both standing in the relation, practically, of stockholders—as to what expenses should be deducted from gross earnings, to arrive at net earnings. The Court held that a reasonable amount for betterments and improvements should be deducted. Thus, in a case involving stockholders interests, and not those of the public as rate payers, the practice of reducing dividends by improvements of the property was approved.

That case was under review in

So. Pac. Ry. Co. v. Board of Commissioners, 78 Fed., 236, involving the question here, namely, in fixing rates, what should be allowed as deductions from gross earnings in order to ascertain net earnings; and the Court held that the Commissioners in fixing rates should exclude betterments, but should allow for reasonable renewals, improvement of road, track and equipment.

Thus, the public may be charged with rates to preserve and maintain the property in an efficient condition to do the public service, but that the stockholders, and not the public, must pay for the betterments to their property.

The effect of this 2c advance is hardly perceptible in these earnings of 1903, for the rate went into effect April 15, 1903, and only 1½ months of this increase was available, or only about $125,000 distributable among all of the interested roads.

The Illinois Central report to stockholders 1903, p. 3, shows that during the year 1902-03, it bought 63 new engines, of which 7 were to replace old ones, or 56 new additions to equipment (Stip., par. XXI, R. V. I, 431). The average number of miles operated was 4,292, or one new engine for every 75 miles of road

(**Id.,** XXVI, V. I, 433). Also, there were 9,666 new freight cars added to equipment, or 2.27 cars per mile (**Id.,** XXI, R. V. I, 431). Mr. Fish testified that the Illinois Central had, and had had more traffic than it could haul, and that it was buying additional equipment as fast as it could to meet this demand (R. V. II, 462). With more traffic offered than it could haul, with full dividends paid, and a growing net income every year, it would not seem that the Illinois Central, either north or south of the Ohio, had any just claim to more revenue; and this is further demonstrated by its subsequent financial condition.

Illinois Central Annual Report to June 30, 1903, shows (see Stip., par. XXVI, R. V. I, 433):

Net income from operation	$10,729,393.13
Surplus dividend fund from 1901-02	1,132,446.92
Net available for dividend, 1903	$11,861,840.05
Disposed of as follows:	
Annual dividends, 6 per cent.	$5,702,400.00
Sinking fund set apart to provide for bonds	100,000.00
Set aside for betterments	4,881,253.13
Surplus	1,178,186.92
	$11,861,840.05

This $11,861,840.05 would be 11.29 per cent on its $95,040,000 of capital stock.

Illinois Central report to June 30, 1904, shows (see Stip., par. XXVII, R. V. I, 434):

Net income for the year ended June 30, 1904	$ 8,865,927.51
Surplus dividend fund from 1903	1,178,186.92
Amount available for dividends	$10,044,114.43
Disposed of as follows:	
Annual dividends, 6 per cent.	$ 5,702,400.00
Advanced to Dubuque and Sioux City Railroad Co.,	536,618.76
Set apart for betterments	2,579,328.75
Amount carried forward to surplus dividend fund for future dividends	1,225,766.92
	$10,044,144.43

Being 10.56 per cent. on $95,040,000 of capital stock.

Illinois Central annual report to June 30, 1905, shows (see Stip., par. XXVIII, R. V. I, 436):

Net income to June 30, 1905	$10,135,341.98
Surplus dividend fund brought fwd. from June 30, '04,	1,225,766.92
Amount available for dividends	$11,361,108.90
Disposed of as follows:	
100th semi-annual dividend, 6 per cent. regular, and 1 per cent. extra—7 per cent.	$ 6,652,800.00
Discount on bonds sold	1,255,395.71
Added to insurance fund	500,000.00
Set apart for betterments	1,863,886.27
Carried forward to surplus dividend fund for future dividends	1,269,026.92
	$11,361,108.90

Being 11.94 per cent. on capital stock, of $95,040,000.

The dividends paid were 7 per cent., and in addition thereto the amount added to insurance fund (see Stip., par. XXIX)	$ 500,000.00
Amount set apart for betterments was (see Stip., par. XXX)	1,683,886.27
Amount carried forward for future dividends (see Stip., par. XXVIII)	1,269,026.92
Total	$3,442,913.19

Or, about 5 per cent. on the capital stock.

Dividends of 1898, were 5 per cent.; dividends, of 1899, 5 per cent.; dividends of 1900, 5½ per cent.; dividends of 1901, 6 per cent;. dividends of 1902, 6 per cent.; dividends of 1903, 6 per cent.; dividends of 1904, 6 per cent.; dividends of 1905, 7 per cent. (see Stip., par. XXXI, R. V. I, 438). An **increasing increase.**

In the **Illinois Central** report 1905, the comparisons show (see Stip., par. XXXII, R. V. I, 438-9):

Gross receipts increased	5.72 per cent.
Expense of operation increased	.89 per cent.

Taxes increased	4.38 per cent.
Receipts of sales from land decreased	93.94 per cent.
Excess of income over expense of operation and taxes increased	15.84 per cent.
Net income for fiscal year increased	14.32 per cent.
Amount available after deducting fixed charges increased	13.11 per cent.
Amount of dividend paid to be set apart	16.67 per cent.
Sum appropriated from income for betterments decreased	34.72 per cent.
Sum appropriated from income for other purposes	227.12 per cent.
Surplus dividend fund has been augmented by	3.53 per cent.

Of the $4,400,822.27 (p. 11) expended for permanent improvements (see Stip., par. XXXIII, R. V. I, 439), there was $1,683,688.29 defrayed from income. (See Stip., par. XXVIII, R. V. I, 437.)

From this it is manifest that the financial condition of the Illinois Central is better than at any time within its history; and as conclusive evidence that it does not need the 2c advance on lumber in aid of its revenue, it has offered to allow 2c per hundred as tap line divisions since February 1, 1906 (Enochs', R. V. I, Complts. New Ev., pp. 415, 401).

In addition to the foregoing, and as statistical evidence conducing to prove our position, the Illinois Central Reports of 1904 show on page 1, "Summary of the Company's business," which is set forth in the **Stipulation in the Record** in paragraphs XXVI, XXVII and XXVIII, R. V. I, pp. 433, 434, 436; and on page 2 thereof, Title, "As compared with the preceding year," which is set forth in said Stipulation, par., XXXII (R. V. I, 438-9); and its "General Balance Sheet," which is set forth in said Stipulation, par. XLI (R. V. I, 448); and on page 14, table No. 7, "Average Receipts per Ton per Mile," which is set forth in said paragraph XLI of said stipulation.

Exhibit No. 3 of Mr. Fish's testimony (R.V. II, 812) shows the statistical history of the Illinois Central, both north and south of the river, from 1883 to 1903, inclusive, and shows an enormous

increase in the "net receipts from operation" and in the "permanent improvements and other expenditures paid from income," and in the "yearly net receipts applicable to dividends," and confirms our contention.

Louisville & Nashville.

The reports to stockholders 1900-1903 in evidence show (R. V. II, 638; see Stip., par. X, R. V. I, 426) that the Louisville & Nashville charged to operation expenses these sums for permanent improvements in 1899, $517,784.59; 1900, $1,021,843.06; 1901, $1,474,502.72; 1902, $1,487,279.19; 1903, $2,000,203.63; or, in five years, $6,501,073.19, an average, per annum, of $1,300,214.64; or, 21 2-3 per cent. on its capital stock of $60,000,000 (Stat. Rys., 1903, p. 348).

Its said report for 1902-03, p. 8, "Growth of Traffic," net earnings, etc., from 1893 to 1902 shows an exceedingly satisfactory financial growth (R. V. II, 641) thus:

LOUISVILLE & NASHVILLE.

YEAR.	AVERAGE MILES OPERATED.	GROWTH OF GROSS EARNINGS.	OPERATING EXPENSES.	NET EARNINGS.	NET EARNINGS PER MILE.	PER CENT. OF EXP. TO EARNINGS.
1893–4	2,955.98	$18,974,336.93	$11,863,784.87	$7,110,522.06	$2,405.49	62.53
1900–1	3,169.27	28,022,206.90	18,233,033.50	9,789,173.40	3,088.77	65.07
1901–2	3,326.75	30,712,257.37	20,902,437.84	9,809,819.53	2,948.77	68.06
	Inc. 156.48					
1902–3	3,438.93	35,449,377.84	23,970,812.44	11,478,565.40	3,337.83	67.62
	Inc. 112.18					

In 1902-3 expenditures for "equipment" "improvements and additions to the property," charged to operating expenses (report, p. 9), were $2,000,203.63. (See Stip., Par. X, R. V. I., 426).

The following comparison illustrates that there is no "increasing decrease" with it:

		1902–3	1901–2	PERCENTAGE INCREASE.
Earnings per ton per mile	(Report p. 16)	.779	.741	5.1282
Expense per ton per mile	" "	.542	.513	5.6530
Net earnings per ton per mile	" "	.237	.228	3.974
Percentage of expenses of freight earnings	" "	69.53	69.21	.4624
Net earnings per mile of road	" "	$3337.83	$2948.77	13.1943
Cash dividend 5 per cent. 1903		$3,000,000	(Stat. Rys. 1903, p. 580)	

Surplus after payment of dividends to credit of profit and loss account (report, p. 22), $3,211,047.74 (see Stip., par. X R. V. I, 426).

If the amount of $2,000,203.63, which was deducted from income in 1902-03, through its charge to operating expenses, was added to the $3,000,000 dividend, it would have yielded a dividend of 8.33 per cent. in 1903, without touching the "surplus" of $3,211,047.74.

This demonstrates that the L. & N. has no right to claim an increase in its revenues; and its subsequent financial condition confirms it, as shown by the report of the Louisville & Nashville of 1905 in "Growth of Traffic," and "Improvement Account," set forth in said Stipulation, paragraphs XLIII, and X (R. V. I, 450, 426).

Southern Railway.

The capitalization of the Southern Railway is so unreal as not to be a basis upon which to predicate actual transactions. It was an evolutionary scheme, in which the factors are these depreciated railway properties, operated by financial genius, upon a confiding and willing public, to exact sufficient tolls to ultimately create anew the properties, and to make the capital stock of value. Such is its history deduced from the evidence and from its annual reports. This evolution has developed rapidly because of the excessive tolls exacted from the public for the services rendered.

In its answer to complainant's Int. 9, (see Stip., par. XI, R. V. I, 426-7), it has set forth in full its earnings, growth of income, etc., from 1895-96 to 1903. In 1894-95, when, according to its report, its properties were so run down as to require practically reconstruction, its gross income was $17,114,-791, and its net income was $5,051,937.43 (**Id.**, par. XI, XXII, R. V. I, 426, 431-2).

Each succeeding year its gross and net incomes increased until its gross in 1903 reached $42,354,059, and its net $11,364,919. Prior to 1897 it paid no dividends; in 1900 it paid 3 per cent. on its preferred stock (see Stip., par. XXII, R. V. I, 431-2; R. V. II, 980). In 1900-01 it paid on its preferred stock 4 per cent.; in 1901-02 one dividend on preferred stock of $1,500,000; in 1902-03, three dividends of $1,500,000

each, aggregating $4,500,000; and, after charging off $221,497.58, it carried over to the credit of profit and loss, $5,962,561.57 (see Stip., par. XLVIII, R. V. I, 458).

When consideration is given to the enormous amount of earnings which must necessarily go into operation expenses under this scheme of development its net earning's balance is no criterion for judgment.

The Southern took up the Mobile & Ohio which, as shown, up to that time had never declared a dividend except once, and that of 1 per cent., and by its contract stipulated that it would guarantee a dividend of 4 per cent., after three years, on the capital stock of the Mobile & Ohio, and to evidence this obligation issued its own certificates for those of the Mobile & Ohio (R. V. II, 408). Thus, by contract, irrespective of the public or its rights, it is to exact the tolls to pay this 4 per cent. dividend, and whether reasonable or unreasonable. The 4 per cent. must be earned, and then something more for the Southern itself, and thus the unreasonable demand extends through two impecunious corporations.

The Reports of the Southern Railway for 1904 and 1905, by its "Income Account," and by "Improvements and Betterments not to be capitalized," set forth in paragraphs XXXIX-IV of said stipulation (V. I, 444, 422), show that its improvement has materially advanced since 1903, and that masterly success has attended the development of these run-down properties at the expense of the public.

The annual report of the Southern Railway Company for October 1, 1904, (see Stip., par. XXXIV, R. V. I, 440), shows by income account that gross earnings from operation exceeded in 1904 those of 1903 by $2,775,717.58; and that operating expenses and taxes, for 1904, exceeded those of 1903, $2,126,327.24; and that the net earnings from operation of 1904 exceeded those of 1903 by $629,390.34; and that a dividend of 5 per cent. on its preferred stock was paid in 1903 and 1904; and that in 1904, after paying 5 per cent dividend, there was a "surplus" over preferred dividend of $1,180,399.92—an increase over 1903 of $337,922.86,

and with "special appropriations for improvements" not to be capitalized, consisting of costs of reduction of grades and curvatures, eliminations of grade crossings, new shop and station buildings, strengthening bridges not requiring renewals but needed for use of heavy motive power, new locomotives, in anticipation of renewals, and miscellaneous small improvements not producing revenue.

For 1905, the income account (Annual Report, Southern Railway, Stip., par. XXXV, R. V. I, 71) shows that the gross earnings from operations increased in 1905 over 1904, $3,035,330.81; and that the net earnings from operations in 1905 exceeded those of 1904 by $1,068,283.32. That 5 per cent. dividend was paid in 1905 on the preferred stock; and that after this payment there was a "surplus" over preferred dividend of $2,151,632, or, an increase over 1904 of $971,232.08; and, after appropriating for betterments not to be capitalized, the sum of $1,056,549.49, there was carried as a balance to credit of profit and loss, $1,095,082.51; and the same recital is made as to improvements, and betterments not to be capitalized as is recited, **supra.**

The condition of the Southern subsequent to the date of this advance, April 15, 1903, confirms our contentions.

Mobile & Ohio.

Fortunately the Commission had in its records the status of the Mobile & Ohio. This road was destroyed during the Civil War, and rebuilt after the war, and it carried in its construction account the cost of both constructions. The separation of these eras of construction was called for and promised but for some reason was not furnished. Its "cost of road and property" is given in its annual report to stockholders of 1903, (see Stip., par., XII, R. V. I, 427), to be $27,353,922.30. Its capital stock outstanding, **Id.,** p. 17, is stated to be $5,370,600. Its funded debt, **Id.,** p. 6, is given as $26,450,765.56. Its earnings and expenses in 1903 increased over 1902 thus:

Its gross earnings increased, **Id.,** p. 9	15.01 per cent.
Maintenance of way and structures increased	31.20 per cent.
Maintenance of equipment increased	31.53 per cent.
Conducting transportation increased	8.89 per cent.
General expenses increased	5.59 per cent.
Taxes decreased	3.89 per cent.

As stated, one-half of this 8.89 per cent. of increase for conducting transportation was for fuel (**Id.**). The large increase in maintenance of way and structures and of equipment reflects the large improvements being made; 216 miles of new rail, or nearly 25 per cent. of the whole system, having been relaid with 75lb. rail in 1902 and 1903. If an accounting for these reconstruction expenses in operation expenses was had in net income account, it would be largely increased. As it is after the operating expenses for 1902 of $4,489,186, were increased in 1903 to $5,211,171, or $721,985, the net income still increased from $2,020,302 in 1902 to $2,275,808 in 1903, or $255,506, and it paid, for the first time in its history, a dividend of 2 per cent. and still carried to the credit of profit and loss, $305,213.93 (see Stip., par., IV. R. V. I, 422).

The Exhibit, showing the financial condition of the Mobile & Ohio from 1889 to 1903, is on record, V. II, 934, and it shows the increase of "net income from operation" from $772,166.77 in 1894-5 to $1,639,719.36, or more than 111 per cent.

This increasing prosperity is confirmed by the report of the Mobile & Ohio of 1905, by "Income Account," and "Cost of Road," and "Operating Account," set forth in par. XXXIX, of Stipulation, V. I, p. 444, of record.

If the M. & O. is entitled to more revenue, which we deny, it can be readily raised so far as lumber is concerned, and a better result attained than by this advance of 2c, by cancelling the 3c-3½c tap line divisions which is deducted from its share of the rate on nearly all of the lumber arising on its line. Let it be just before it is generous.

The Gulf & Ship Island.

The annual report to its stockholders for 1903 demonstrates that it is not entitled to more revenue but on the contrary could easily stand a reduction of from 3c to 3½c on lumber. The evidence shows that its $5,000,000 of capital stock was **margin** in the construction of the road. Mr. Gee, the auditor, could not tell from his books whence it came. (Defts. New Ev., V. I, 200). Its income account of 1903,(see Stip., par. XIII, R.V. I, 427-8), shows its net income from operation increased in 1903 over 1902, 44.05 per cent.; and that, while its gross earnings increased in 1903 over 1902, 24.03 per cent, its operating expenses and taxes only increased 14.79 per cent; that it paid a dividend of 5 per

cent.; increased its surplus, 28.92 per cent., and carried over a surplus of $333,718. That its operating expenses in 1903 were 63.32 per cent., and in 1902, 68.42 per cent., or a decrease in 1903, of 5.1 per cent.; and that the increase of net earnings per mile operated in 1903 over 1902, was $762. On p. 13, said Report, (**Id.**) it is stated: "Of the increase of $330,363 in total earnings in 1903, $247,263, accrued in the freight department, and $71,629 in the passenger department, the remainder being derived from miscellaneous sources." Even without expurgation of its capital stock account these figures from its own reports show that it is in no need, for any reason, for an increase of its revenue; and, especially, not to meet an "increasing decrease" in its net income.

The exhibit to Mr. Gardiner's evidence (R. V. II, 679) of the Gulf & Ship Island income account to Sept. 30, 1903, shows an increase of surplus over the corresponding three months of the year before, and thus the **increasing increase** continues.

The Commission (R. V. II, 876-7) tabulated the comparative gross and net earnings, etc., of the railroads interested from 1890 to 1903, and showed that the net earnings had greatly increased. (Op., R., **Id.,** 976-982.) From the Statistics Railways of the United States, prepared by the Commission in evidence we compiled a continuation of these statistics (R. V. II, 976-7) in the Circuit Court, and read the same in evidence in the Circuit Court (Complts. New Ev., V. I, 396-7, 484) as follows:

Findings of Interstate Commerce Commission (R. V. II, 976) extended to include 1904 and 1905, taken from the Statistics Rys. U. S., 1905, pp. 38, 40, 44, 46, 42, 36.

ROADS.	Years	Gross Earnings from Operations.	Total Operating Expenses.	Percentage of Operating Exp. to Earnings.	Net Earnings.	Net Earnings Per Mile Of Road.	Total Mileage Operated.
Illinois Central Railroad (south of Cairo)	1903	$16,193,850	$10,624,241		$ 5,569,609		1374
	1905	18,857,106	13,142,316		5,714,790		1402
Increase		$2,653,356	$2,518,075		$145,181		28
L. & N. (south of Ohio River)	1903	$33,334,612	$22,462,486		$10,872,126	3322	1342.48
	1905	36,028,646	24,960,918		11,067,728		3877.98
Increase		$2,694,034	$2,497,432		$195,602		
Southern Ry. Co. (in Virginia and the Carolinas)	1903	$20,803,851	$13,833,223		$6,970,628	1986	3510.65
	1905	21,010,961	15,626,636		5,384,325		3311.06
Increase		$187,110	$1,793,413		$1,587,303	Decrease	
Southern Ry. Co. (west of Virginia and the Carolinas)	1903	$19,072,994	$13,984,134		$5,088,860	1570	3248.48
		21,010,961	15,626,636		5,384,325		
Increase		$1,937,967	$1,642,502		$ 295,465		
Cincinnati, N. O. & Texas Pacific	1903	$6,153,580	$4,431,571		$1,722,009		337.73
	1905	7,338,930	3,569,652		1,933,772		337.73
Increas		$1,184,350	$861,829	Decrease	$211,763		

ROADS.	Years.	Gross Earnings from Operations.	Total Operating Expenses.	Percentage of Operating Exp. to Earnings.	Net Earnings.	Net Earnings Per Mile Of Road.	Total Mileage Operated.
Alabama G. S. R. Co.	1903	$2,670,646	$1,900,748		$769,898		309.41
	1905	3,241,776	2,551,039		690,737		309.41
Increase		$571,130	$650,291		$79,161	Decrease	
N. O. & N. E. R. R. Co.	1903	$2,273,617	$1,592,005		$681,612		195.90
	1905	2,557,237	1,838,220		719,017		195.90
Increase		$283,620	$235,125		$ 27,405		
M. & O. R. R.	1903	$6,836,629	$5,077,311		$1,759,318		874.12
	1905	7,716,377	5,393,172		2,323,205		926.08
Increase		$879,748	$315,861		$563,887		41.96
Alabama & Vicksburg	1903	$1,149,039	$ 818,966		$330,073		142.78
	1905	1,353,788	1,036,997		316,791		142.78
Increase		$204,749	$117,031		$13 ,282		
G. & S. I. R. R.	1903	$1,705,047	$1,051,687		$653,360		251
	1905	1,877,397	1,361,369		516,028		279.77
Increase		$ 172,350	$ 309,682		$137,342	Decrease	

After diligent inquiry of both the Auditor, Mr. Gee (Defts. New Ev., R. V. I., 200), and of Mr. Jones, its President, it could not be found that anything was paid for the $5,000,000 of stock issued prior to June, 1903, out of a total book capitalization of $10,139,075.50. When the $5,000,000 of stock is deducted, the cost of the road, according to the books, would be $23,905 per mile, as against $40,394.72 per mile on the capitalization of $10,139,075.

Mr. Searles, an engineer of wide experience, examined the Gulf & Ship Island Railroad, and testified that the main line with equipment could be duplicated for $12,000 per mile and the branches for $9,000 per mile. (R. 579). Mr. Robinson (R. V. II., 85), testifies that it could not have cost $20,000 per mile, and that the $5,000,000 of stock was a gratuity.

The Gulf & Ship Island Report of 1904 (See Stip. par. XXVI, R. V. IX, 33,4), recites the "decided decline in the demand for lumber owing to the closing down of car works and general financial stringencies, etc., but, notwithstanding these unfavorable conditions, we were able to keep our revenue up to the high level reached the year previous." That for 1904 "gross earnings show an increase over the previous fiscal year, in which year railroad revenues generally reached the maximum."

The report of the Gulf & Ship Island for 1905 (See Stip. XXV, R. V. I., 432), "gross earnings show an increase over the previous year, notwithstanding prolonged interruption of traffic by the almost unprecedented rains of January, February and April."

The great falling off in the demand for lumber for cars during 1904–5, and the mills reducing running time one-third, necessarily had a great influence, temporarily, on the traffic, of the Gulf & Ship Island. That cause now has passed, and in 1905 there is an advanced demand for yellow pine lumber for cars. (Green, Defts. New Ev., R. V. I., 245,6; Enochs, Complts. New Ev., R. V. I., 406,7). Railroad reports, in evidence, speak of the same story of continued financial improvement during 1904 and 1905. And this, notwithstanding the fact, that during 1904 there was a great falling off in the shipments of lumber, and whereby the lumber mills ran only on two-third time, (L. Green, Defts. New Ev., R. V. I. 119,120), because of the falling off in the demand for the construction of cars by the railroad companies.

The Reports of the New Orleans & Northeastern Railroad for 1904 and 1905, by "Income Account" and "Expenses," set forth in paragraphs XLIV and XLV of said Stipulation. (R. V. I., 450-5), and the Reports of the Alabama & Vicksburg

Railway for 1904 and 1905, set forth in paragraph XLVI of said Stipulation (R. V. I., 455), show that they have had abundant financial prosperity, and that they should not, for the benefit of the intermediate railroads, joined in making this advance.

It is unnecessary to consider further the Alabama & Vicksburg Ry., and the New Orleans Northeastern, the Alabama Great Southern and the Cincinnati N. O. & Texas Pacific Ry., as the salient points in regard to their financial conditions have, so far as necessary, been considered.

The Commission compiled the statistics of the railroads under the 13c rate from 1895 to 1899, and under the 14c rate (R. V. II., 980) from 1899 to 1902, and it showed an increasing increase of net earnings of all the railroads except the Cin. N. O. & Texas Pac. Ry. Hence, the finding of the Commission and the Court that from a revenue point of view, the advance was unwarranted, should be affirmed.

III.

AS LUMBER TRAFFIC PROBLEM.

If the service rendered by the railroads was not sufficiently compensated, and if there was necessity for additional revenue, then, should this additional burden of 2c be put upon yellow pine lumber?

The evidence satisfactorily shows that this advance in the rate was confined to yellow pine lumber in the South, and a like co-temporaneous advance of 2c was placed upon grain in the West.

The theory of the selection of yellow pine lumber for this advance was:

1. That that industry was unusually prosperous, and that the traffic could bear it; and, that the short supply of cars could coerce its payment.

2. That the advance would be borne by the consumer, and not by the manufacturer.

The first of these grounds is unfounded in law and in fact; the second is unfounded in fact.

The Commission in the Proposed Advance in Grain Rates, supra., repudiated this favorite theory of the traffic men as a basis for rate making, viz.: that the standard of reasonableness was any rate which the traffic will bear, and declared that the real question was what the public should bear. The evidence to conclusively prove that the rate was reasonable was

assumed by the traffic men to be whether the traffic could move under the rate. If it did, the rate was reasonable; if it did not, the rate would be too high. In this unreasoning philosophy, the destruction of the traffic, with its disastrous consequences to property, was the sole evidence of the excess of rate. The death of the patient first shows the existence of disease to these illogical rate doctors.

The fact was proved beyond dispute that the advance could not be added by the manufacturers to the price, and, therefore, the manufacturer and not the general public, the consumer, is made to pay this advance out of the price of the lumber. The fact that this advance cannot be added to the manufacturer's price, and thereby, under the settled principles of commerce, be distributed upon the general consuming public, as the cost of transportation, demonstrates that the advance is unreasonable. The laws of trade require that the cost of transportation to the consuming market must be borne by commerce and not by the producer. The producer's price, plus freight, plus a margin of profit, is the selling price of the merchant. This law of trade was recognized by the carriers when they said that all the mill men would have to do would be to add the advance to the price and make the consumer pay it. It is unreasonable in the carriers to fix a rate upon lumber which forbids its transportation to market, except upon condition that the producer shall pay the freight out of his margin of profit. Thereby the rate becomes not a freight charge to be borne by the commerce in transit, but an impost laid upon the producer who must pay it or cease to do business. If the producer's margin of profit is too small to profitably operate after paying this advance, they must either operate at a loss or quit business. Thus, this advance is indirectly a tax laid upon the manufacturer, and as an element of cost in his manufacturing business, and not a charge upon the commerce itself to be paid by the general public. When the goods transported cannot be made to pay the freight, then they cease to be, legitimately, the subject of commerce, and the carrier's right ceases to exact his toll. If commerce cannot be made chargeable with its cost of transportation, then as a transportation problem, the traffic cannot move under the rate, and the carrier's exaction of it is unreasonable.

The amount of profit of the manufacturer is not a proper

element to consider to determine whether a rate is reasonable or not. (Op. Com. R. V. II., 987). The question is, what is a reasonable compensation for the service rendered by the carrier to the public, and it matters not whether the service is rendered to a prince or a pauper. It is the merit of the service rendered that must control.

If the profitableness of the lumber business is to be considered, then the lumber business is not sufficiently profitable to bear this additional burden.

Lumber, as shown, supra, (R. V. II., 173), is a constant, slow traffic, and not subject to sudden changes in market conditions. It might be called the regular customer of traffic. The conditions of its successful manufacture require that it should be produced whether the market is favorable or unfavorable. In 1896, when every mill in Mississippi was shut down except two or three, Mr. Enochs increased his output by working day and night to reduce his losses to a minimum, to avoid the catastrophe of disorganizing his plant by shutting it down

The evidence of Mr. Enochs, (R. V. II.) 181 shows the margin of a profit as a manufacturing problem; he gives the mill cost of lumber, the stumpage allowance therein, and the average sale price of lumber, and the difference between cost of manufacture, and not including the element of commercial hazards or losses; viz.:

May 1, 1901, to April 30, 1902.

Manufactured Feet.	Mill Cost Per M Including $1 Stumpage.	Average Sale Price.	Difference Cost and Sale Price Per M.
21,758,871	$9.39	$11.43	$2.04

May 1, 1902, to April 30, 1903.

	Mill Cost Per M Including $2.25 Per M Stumpage.		
23,296,773	$10.93	$12.35	$1.42

The stumpage was included in 1902-3 at $2.25 because that was the market value of stumpage at that time. (R. V. II., 181). Mr. Enochs had sold in 1902 a large body of pine lands near these and more remote from the Illinois Central at $2.25 per thousand, and, hence, his raw material had increased to that price. Mr. J. H. Hinton testifies that the price of stump-

age in the region north of Gulfport was $3 to $3.50 per thousand (R. V. II,. 131). Mr. Gardiner testifies (R. V. II., 25), that stumpage 15 miles from the railroad sold at $2.25 per thousand, and at $3 per thousand, three or four miles from the railroad.

Mr. Gardiner shows, (R. V. II., 46, 7), that it cost to manufacture lumber at his splendidly equipped mill about $10.50 per thousand, with stumpage at $2.50 per thousand; and that his average sales for the year 1902-3 were $11.77 at the mill; or, that the margin of the manufacturer's profit was $1.27 per thousand, or less than 10 per cent. of the average selling price.

J. J. Newman Co., at Hattiesburg, sold its output (R. V. II., 971):

For 1900 at the average price of $10.89.
For 1901 at the average price of $10.36.
For 1902 at the average price of $11.20.
For ten months 1903 at the average price of $10.24.

Fernwood Lumber Co. sold its output,(R. 972), with $9.39 milling cost, not including commercial losses, at $11.43, or on a margin of $2.04 per thousand feet from May 1, 1901, to May 1, 1902, or 7 per cent. on its capital, and on a margin of $1.42 per thousand feet for 1902-3 about 6 per cent, on its capital. (R. 972.)

The average profit in this section of manufacturing plants is from 10 per cent. to 25 per cent. profit. (Gee, Ev. R. V. I, New. 61.)

The profits of Eastman, Gardiner & Co., 1902-3 were (cost $10.50, selling price $11.77) $1.27 per thousand feet. (R. 973.)

Since the hearing before the Commission evidence was taken tc show cost and prices of yellow pine lumber to the manufacturer, (See Cmplts. New Ev., Appendices Exhibits I, 1, R. V. I., 409-10) as follows:

Butterfield Lumber Co. (on Illinois Central):

1903—Total cost lumber per M	$11.94
1904—Total cost lumber per M	12.92
1904—Average price lumber per M	12.54
Loss	.38
1905—Total cost lumber per M	$13.53
1905—Average price lumber per M	15.08
Profit	$1.65

Eastman, Gardiner & Co. (on N. O. & N. E. and Gulf and Ship Island):

1904—Total cost lumber per M	$10.37
1904—Average price lumber per M	10.64
Profits lumber per M	.27
1905—Total cost lumber per M	$11.44
1905—Average price lumber per M	13.57
Profit lumber per M	$2.13

Pearl River Lumber Co. (on Illinois Central) (See R. V. I., Complts. New Ev., 399-400):

1902—Total cost lumber per M	$10.14
1902—Average price lumber per M	12.55
Profits lumber per M	$2.10
1903—Total cost lumber per M	$10.22
1903—Average price lumber per M	11.93
Profit lumber per M	$1.71
1904—Total cost lumber per M	$11.03
1904—Average price lumber per M	11.68
Profit lumber per M	$ .65
1905—Total cost lumber per M	$11.43
1905—Average price lumber per M	13.69
Profit lumber per M	$2.26

The Illinois Central paid the same price for its lumber in 1902 as it paid in 1901. (R. V. II., 169.)

When this extreme low margin of profit to the manufacturer is considered, without deducting anything for commercial losses or hazards, which are bound to occur in marketing such a large volume of products, it demonstrates that the business is run on an extremely narrow margin of profit.

It has been contended that the advance in the price of stumpage is to be considered as an element of the profit to the manufacturer in fixing rates. This is unsound, The trees are a part of the real estate, (Fox v. Lumber Co., 80 Miss., 1, 6) just as a growing cotton or wheat crop would be, and they are

the mere raw material for the manufacture of lumber. As a real estate transaction those who have had the business foresight to buy timber cheap have made money. This profit on the timber was made whether the owner was a manufacturer or a real estate owner. Its raw material costs so much upon the market. If the cotton planter owns the land from which he grows cotton for a factory owned by him, is he not as much entitled to the selling price of his cotton as a profit on his plantation, if he used it as raw material for his factory, as if he sold it upon the market and bought other cotton upon the market for his mill? The principle is the same here. In fact, Mr. Enochs sold said large body of his stumpage at $2.25 per thousand rather than mill it; and if he now has to buy the stumpage for that mill at $2.25 per thousand, could it be said that his lumber did not cost him the $2.25 thus paid?

Mr. Compton by Ex. 1 to his evidence (R. V. I. Defts. New Ev., 287-308) and by Ex. 4, (Id. 311-321), and Mr. L. Green by his Exhibits Nos. 1, 2, 4 and 6, (Id. 323-329), endeavored to controvert the evidence for the Complainants as to the price of the lumber, but Mr. Enochs rebuts this evidence, (R. V. I. Complts. New Ev., 397-403), and shows that these Exhibits are misleading.

The fact that this rate is excessive is shown by its effect upon the Georgia mills where the land is not timbered as heavily as in Mississippi. Their testimony in Tift v. So. Ry. Co., supra, was that they were unable to market their lumber in Central Traffic territory because of this rate. The principles of Political Economy applicable to rent under these circumstances would be that where the rent (or rate) was above the cost of production plus a margin of profit, the first effect would be that the less productive lands would not be rented; then the next, and so on. This is just what happened. The Georgia mills, cutting thinner timber, could not market in the territory and it is thrown out as to them. True, the Mississippi mills can still operate, but the effect is noticeable upon them. Camp & Hinton, from being large shippers to this territory, have been driven to exporting all but 30 or 40 per cent. for 1903. (R. V. II., 129, 130.) The Clearing House Report for 1903, Exhibit 12 (R. V. II., 622 c), to Mr. Enochs's evidence, shows that while there had been a large increase in the cut of the mills in the

states of Arkansas, Texas, Missouri, Louisiana and Alabama, there had been a decrease of the cut of Mississippi, operating the same number of mills as in 1902, by about 15 million feet in the year 1903. This increase in 1903 in Alabama may be due to increase of exports through Mobile, but it is certain that the other states increased, while Georgia and Mississippi decreased.

The year 1904 was exceedingly adverse to lumber manufacturers. They had to reduce operations by one-third time, and then, as shown, **supra**, there was little margin in the business. This was caused by the falling off in the demand for cars. In 1902 there were about 140,000 cars built; in 1903 about 165,000; in 1904 about 65,000; in 1905 342,000; (R. V. I. Complts., New Ev., 406, 7, Enochs). The demand for cars and for lumber is in direct ratio. Hence, this abnormal demand for cars in 1905 has created an abnormal demand for lumber, and has made business good; but it is only temporary, and when this demand is supplied, the trade will recede to its normal relations.(Id.) (R. V. I. Defts. New Ev., Green, 244, 5, 6.)

The advance of this rate in 1903 could hardly be sustained by proving that the lumber business was, from temporary, abnormal causes, in 1905 rendered good. A condition no one could know would arise. What did happen immediately following the advance was an exceedingly depressed lumber trade; the trade in 1904 being almost disastrous.

The lumber men have as a rule made money, but they have made it like any real estate dealer would have done, viz.: buying these pine forests when they were cheap, and holding them until the deforestation of the north and east had caused them to increase largely in value. This increase was in no way due to the railroads, for,as shown, whenever they thought the traffic would bear it, they have increased the rate, and thereby appropriated, through their delegation of sovereignty, the property of others.

The burdens, really belonging to the carrier, which lumber is made to bear, increase greatly and directly the freight it pays. The carrier is bound by law to furnish a suitably equipped car to transport its freight. It cannot furnish a gondola or flat car and require that it be loaded with lumber higher than its sides, and then charge the shipper with the cost of putting the car in suitable condition to perform the carrier's duty to furnish a suitable and safe car for the transportation of its freight. Yet, this is done when the shipper is required to stake and strip the car in order that it may increase its load, and to make more profit for the carrier. In this unlawful transaction, the freight

on the stakes and strips is required to be paid by the shipper.

Thus, an additional expense of $5.94 per car, (Mr. Gardiner's Ev., R. V. II., 31), on every flat or gondola car is imposed upon the shipper by compelling him, by substitution, to discharge the carrier's duty to provide proper equipment. The Atchison & St. F. R. R. has recently issued a tariff giving credit for the freight on this equipment (Mr. Gardiner's Ev., R. V. II., 523, 4), and this recognizes the principle for which we contend.

The evidence of the mill men so clearly sets forth the burdens lumber is required to bear from this source that it would extend this discussion to too great length to further enlarge upon it.

Touching the prices for lumber, it is shown by Mr. L. Green's own exhibit, (R. V. II., 906), taken from the American Lumberman, quoting delivered prices in Chicago, that the prices of lumber had not materially changed in 1901, 1902, 1903. By the exhibit to Mr. Enoch's evidence, taken from said Lumberman, the delivered prices in Chicago from 1887 to 1897 are given, (R. V. II., 622 d), and they show that the price in 1889 was $24 to $25; in 1901, $24 to $25; in 1892, $21 to $22; and that then there was a gradual decline until 1898; and thus the present quotations of lumber are not as high as they were in 1889-1891, the period upon which the rates now in force are claimed to be predicated. Even under the carrier's claim it would be unjust to restore the 1889-1890 rate, to bring rates upon a parity, before lumber had reached the 1889-1890 price.

The evidence for the respective parties on the foregoing propositions was conflicting and the facts were controverted. It is impossible to go into all of this voluminous evidence. Mr. Geo. S. Gardiner (R. V. II., 35-7), and Mr. C. W. Robinson (Id. 56-9), and Mr. I. C. Enochs (Id. 185), and other witnesses for complainants, have testified that this advance was unreasonable, and have analyzed clearly and intelligently, the probative elements showing this fact; and have supported by exhaustive comparisons and statistical data evidenced, for illustration, by exhibits, these propositions. The exhibits and testimony of the railroad officers were in many material matters successfully controverted by complainants. As stated, the Commission, in an able and exhaustive opinion reviewing all phases of the propositions, has found the facts upon conflicting evidence, adversely to the appellants' contentions, and this finding, upon full review the Circuit Court, where appellants introduced new evidence to try, if practicable, to meet this finding, has concurred in the finding of the Commission.

FIFTH ASSIGNMENT

There is no merit in this assignment.

This objection was not raised in the proceedings before the Commission; nor by the pleadings, record or briefs in the Circuit Court, and is now made here for the first time.

The Commission had plenary power to make the order complained of, and the Circuit Court, upon the complaint of the Commission, had jurisdiction to enforce it. **Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.,** 204 U. S., 426, where it is said (p. 443):, "the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in according reparation to shippers and to making orders directing carriers to desist from future violation of the act; **that is to say, in necessary legal effect correcting established schedules**"; and (p. 448), "Concluding, as we do, that a shipper seeking reparation **predicated upon the unreasonableness of the established rate must,** under the act to regulate commerce, **primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable,**" etc. (Italics are ours.)

There are many other phases of these matters we could discuss but this brief is already too extended. For these we must content ourselves with the oral arguments.

There is great injustice in both the essence and in the manner of this advance. That it is unlawful, as well as unreasonable and unjust, we respectfully submit, is shown by this record, and it has, as stated, been so adjudged, after exhaustive examinations by the Commission, and by the United States Circuit Courts of both Louisiana and of Georgia, and by the Circuit Court of Appeals, and these five concurrent findings of fact are right, and the decree should be affirmed.

Respectfully,

MARCELLUS GREEN,

GARNER WYNN GREEN,

Of Counsel for Appellee.

APPENDIX A.

Exhibit 20 to I. C. Enoch's Evidence.

Tabulation made at the request of Mr. Commissioner Prouty from tariffs in evidence 1889-93, showing advance between 1889-93 inclusive, and tariff I. C. R. R., B-8110, I. C. C. 1850, effective April 15, 1903.

Date.	Tariff.	No.	Railroad.	No. of Stations Taken.	Old Rate.	Present Rate.	Adv. Rate.
Oct. 4, 1892	M	54	I. C. R. R. with C. & N. W. R. R.	64	26c	26c to 29c	3c
Sept. 9, 1892	M	30	I. C. & St. L. T. H. R. R.	53	20c	20c to 23c	3c
March 3, 1892	M	100	I. C. & C. C. C. & St. L. R. R.	30	20c	20c to 22c	2c
Sept. 22, 1892	M	42	I. C. & O. & M. R. R.	42	22c and 23c	24c to 26c	3c
Aug. 19, 1889	L	955	I. C. and connections	50	26c	29c	3c
May 21, 1893	M	253	I. C. and C. C. & St. L. R. R.	27	23c	24c to 26c	3c
Jan. 29, 1893	Supt. 6 to M	9	I. C. and connections	30	30c	33c	3c
Oct. 11, 1893	M	81	I. C. & Wabash R. R. Bet. Toledo, O. & Woodburn, Ind.	14	26c	30c	4c
			Between New Haven, Ind., and Peru, Ind.	25	25c	27c, 29c, 31c	4c
			Logansport, Ind.		24c	27c	3c
			Detroit, Mich., and other stations	45	24c	30c	6c
Oct. 11, 1892	M	82	I. C. R. R. & Michigan Central and Wabash, Chester & Western R. R. between Willow Creek, Ind., and immediate stations to Detroit, Michigan	14	24c	28c to 30c	4c &6c
Aug. 24, 1892	L	3571	I. C. R. R. and Minneapolis and St. L. R. R.	14	29c	33c	4c
			C. M. & St. P. R. R.	37	29c	30.5c to 33c	2½ to 4
			C. G. W. R. R.	40	29c	30c to 33c	1 to 4
			C. B. & N. R. R.	37	29c	33c	1½ to 4
May 25, 1893	M	258	I. C. R. R. & C. B. & E. R. R.	10	24c	26c	2c
				533 Stations.			

APPENDIX B.

Tabulation showing advance to named stations under tariffs 1889-93 in evidence by I. C. R. R., B-8110, I. C. C. 1850, April 15, 1903. Sheet tariffs for individual stations.

Date.	Tariff.	No.	Stations.	Old Rate.	Present Rate	Adv. Rate.
Feb. 20, 1893	M	189	Litchfield, Ill.	21c	23c	2c
Feb. 16, 1893	M	182	Terre Haute, Ind.	21c	24c	3c
Feb. 18, 1893	M	182	Indianapolis, Ind	21c	26c	5c
Jan. 29, 1893	Supt 5 to M	54	Stillwater, Minn.	29c	33c	4c
Feb. 4, 1893	Supt 11 to M	95	Rock Valley, Ill.	31.14c	36c	4.86c
Jan. 28, 1893	Supt. 9 to M	95	Sycamore, Ill.	24c	26c	2c
Jan. 28, 1893	Supt. 9 to M	95	DeKalb, Ill.	24c	26c	2c
Jan. 17, 1893	Supt. 6 to M	95	Spring Grove, Minn.	34.5c	36c	1.5c
Jan. 20, 1893	M	173	Dalton (Cook Co.) Ill.	24c	26c	2c
April 7, 1893	Supt. 2 to M	42	Lebanon, Ill.	22c	24c	2c
March 26, 1893	M	212	Germantown, Ill.	22c	24c	2c
May 15, 1893	M	254	Olney, Ill.	22c	24c	2c
March 30, 1893	Supt. 1 to M	100	Bell Centre, O.	27c	30c	3c
March 30, 1893	Supt. 1 to M	100	Gas City, Ind.	25c	27c	2c
March 30, 1893	M	214	Akron, Ohio	28c	31c	3c
March 19, 1893	M	203	Martinsville, Ind.	21c	23c	2c
April 12, 1893	M	222	Columbus, Ohio	25c	30c	5c
March 4, 1893	Supt. 13 to M	95	Elizabeth, Ill.	26c	29c	3c
Oct. 17, 1893	M	87	Cleveland, Ohio	28c	31c	3c
May 25, 1893	Supt. 1 to M	223	McLeansboro, Ill.	22c	24c	2c
Dec. 6, 1892	Supt. 1 to M	54	Kingsley, Ia.	31c	33c	2c
Aug. 24, 1892	L	3550	Streator, Ill.	24c	26c	2c
March 2, 1892	L	3167	Leslie, Mich.	28c	30c	2c
March 2, 1892	L	3167	Warsaw, Ohio	28c	31c	3c
Feb. 20, 1892	L	3158	Winona, Minn.	29c	30.5c	1.5c
Oct. 6, 1892	Supt. 1 to M	42	Breese, Ill.	22c	24c	2c
Dec. 28, 1892	Supt. 3 to M	9	Manor, Pa.	30c	33c	3c
Nov. 24, 1892	M	126	Mt. Clemens, Mich.	27c	32c	5c
Oct. 7, 1892	M	87	Cleveland, Ohio	28c	31c	3c
Sept. 21, 1892	M	40	Forest City, Ia.	32c	35c	3c
March 16, 1893	M	200	Bloomington, Ind.	24c	26c	2c
March 16, 1893	M	201	Albion, Mich.	27c	30c	3c
March 14, 1893	Supt. 13 to M	93	Elizabeth, Ill.	26c	29c	3c
Nov. 13, 1892	M	128	Clarian, Ia.	31c	33c	2c
Aug. 11, 1892	L	3551	Eauclaire, Wis.	29c	33c	4c
Dec. 7, 1892	Supt. 2 to M	54	Bancroft, Ia.	32.32c	36c	3.68c
Nov. 2, 1892	Supt. 1 to M	95	Fayette, Ia.	29c	31.5c	2.5c
Nov. 27, 1892	Supt. 2 to M	95	Greely, Ia.	29c	31.5c	2.5c

APPENDIX C.

Table showing advance by I. C. R. R., B-8110, I. C. C. 1850, over rate by I. C. R. R., No. M 24, effective September 29, 1892.

	Present Rate.	Old Rate.	Advance
Duquoin, Illinois	21c	18½c	2.5c
Odin, Illinois	23.6c	20c	3.6
Clinton, Illinois	26c	23c	3c
Sanderall, Illinois	23.7c	20c	3.7c
Centralia, Illinois	23c	20c	2c
Springfield, Illinois	23c	2c	2c
Rockford, Illinois	26c	24c	2c
Dubuque, Iowa	29c	26c	3c
Madison, Wisconsin	29c	26c	3c
Blanchardville, Wisconsin	29c	26c	3c
Sioux City, Iowa	32.5c	27c	5.5c
Webster City, Iowa	33c	27c	6c
Charles City, Iowa	33c	27c	6c
Le Mars, Iowa	35c	27c	8c
Cherokee, Iowa	35c	27c	8c
Sleeden, Iowa	35c	27c	8c
Rock Rapids, Iowa	35c	27c	8c

The above seventeen stations are fairly distributed throughout the territory covered by Tariff, M. 24